SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1922.

THE NORTH CAROLINA RAILROAD TAX CASES.

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vs.
A. D. WATTS, AS COMMISSIONER OF REVENUE OF NORTH CAROLINA, AND OTHERS.

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APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA AND FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF NORTH CAROLINA.

BRIEF ON BEHALF OF THE APPELLEES.

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BRIEF ON BEHALF OF THE APPELLEES.

Statement.

These are bills brought by five of the principal railroads doing business in and through the State of North Carolina

to restrain the collection of the *ad valorem* property taxes for local purposes and the francise tax for State purposes, imposed for the year 1921 by the statutes of that State. The said taxes are imposed alike on all railroads doing business in North Carolina, domestic and foreign, those operating wholly within the State and those doing business both within and without the State. All of these classes of railroads are represented among the plaintiffs. The Southern, the Seaboard, and the Norfolk Southern are foreign corporations, engaged in the business of a carrier both within and without the State. The Atlantic Coast Line is a domestic corporation engaged in the business of a carrier both within and without the State. The Atlantic and Yadkin is a domestic corporation engaged in the business of a carrier entirely within the State.

As originally brought, these bills also attacked and sought to restrain the income tax of North Carolina as applicable to railroads, but the suits having been commenced in the district courts before income taxes had been levied against the plaintiffs, and upon intimation by the district courts that the question of the validity of the income taxes was not before them in these suits, all of the plaintiffs subject to income tax for 1921 brought separate suits in the respective district courts to restrain the collection of that tax, which suits are now pending. As heard below and as here presented, therefore, these suits involve only the validity of the *ad valorem* property taxes and the State franchise tax for 1921.

Under stipulations set out in the records the plaintiffs paid property taxes on respective valuations of their properties greatly less than the assessed valuations upon which

taxes were levied. The amounts thus paid went to the support of political subdivisions of the State. Denying the validity of any tax whatever under the franchise tax law the plaintiffs made no tender of any amount of franchise tax. Interlocutory injunctions were denied by three judges sitting in the district courts under section 266 of the Judicial Code and the plaintiffs appealed. The plaintiffs thereupon applied to the district courts for stay to prevent collection of the taxes in dispute pending these appeals, which stay was refused. The plaintiffs then applied to this court for a like stay pending the appeals, which application was here denied, but upon second application to the district courts the collection of further taxes under the *ad valorem* property tax and of all amounts levied under the francise tax was stayed pending these appeals. The entire franchise tax, therefore, which under the system of taxation created by the North Carolina statutes goes to the support of the State government, is stayed pending these appeals and the plaintiffs have contributed nothing to the support of the State government for the years 1921 or 1922.

The questions presented by the appeals in these suits being substantially if not identically the same, a motion for consolidation was duly filed by the appellees, and in order now to avoid repetition we have prepared but one brief in behalf of the appellees in all the suits. This we trust will receive the approval of the court.

Summary of the Questions Involved.

I.

The *ad valorem* property taxes are sought to be restrained upon the ground of alleged invalidity of the respective assessed valuations of the properties of the plaintiffs upon which assessments these taxes are levied.

The assessments are attacked on the following grounds:

1. That they are illegal, as having been made in violation of statutory method.

2. That they are excessive, and hence are—

In violation of the "true value" clause of the North Carolina Constitution.

A burden on interstate commerce in violation of the Commerce Clause of the Federal Constitution.

A taking of property without due process in violation of the Fourteenth Amendment.

3. That they are discriminatory, and hence are—

In violation of the uniformity rule of the North Carolina Constitution.

In violation of the equal protection clause of the Fourteenth Amendment.

II.

The validity of the franchise tax is attacked on three alleged grounds:

1. That it is a property tax, not a franchise or privilege tax, and hence is in violation of a supposed prohibition

against double taxation in the uniformity rule of the State Constitution and in the Fourteenth Amendment.

2. That if it is a privilege or franchise tax, it is for the privilege of engaging in interstate commerce, and, therefore, a burden on that commerce, in conflict with the Commerce Clause of the Federal Constitution.

3. That the respective franchise taxes have been illegally calculated, in violation of the North Carolina statutes.

We shall divide this brief into two parts. Part I will be concerned with the validity of the *ad valorem* assessment and the property taxes levied thereon. Part II will be concerned with the validity of the franchise tax.

ARGUMENT.

PART I.

THE AD VALOREM ASSESSMENTS AND TAXES.

I.

A brief history of recent legislation and administration in North Carolina with reference to ad valorem property taxation of railroads and others.

1. *The General System.*

At every regular session of the General Assembly of North Carolina are passed two general statutes having reference to taxation and revenue, the Revenue Act, and the Machinery

Act. Revenues for purposes of the State Government are raised under the provisions of the Revenue Act. The Machinery Act gives the authority and provides the machinery for the assessment of property and for the levy of taxes, the avails of which go to purposes of the political subdivisions of the State, counties, cities, towns, and tax districts. These statutes as enacted by each regular term of the Legislature are completely re-enacted and brought forward by the next succeeding Legislature, except in so far as repealed, amended, or amplified.

The Legislature meets regularly every two years, on the odd years. Real estate and railroad property are not, however, reassessed every two years pursuant to every re-enacted Machinery Act, but for many years have been assessed quadrennially. The assessed value stands as the basis for property taxation for four years, and then a new valuation and assessment are made under the provisions of the particular Machinery Act which happens then to be in effect. All personal property, on the other hand, is assessed or returned for taxation annually.

Real estate is assessed for taxation by local assessors in each county where located and that assessment is the basis for all county, city, and other local taxation purposes.

Railroads are assessed, and have been for many years, under an application of the unit rule, as a unit or totality within the State, by central assessing authorities, and then the total assessment is allocated to the counties through which the railroad runs on a mileage basis. A similar allocation is made on the mileage basis to cities, towns, and other local subdivisions through which the railroad runs. These allocated proportions of the total unit assessment are the bases for property taxation.

Until the year 1921, assessments of railroad property were made by a commission of three in its capacity as the State Tax Commission. This same commission had a further capacity as the State Corporation Commission.

A law of the year 1921 abolished the State Tax Commission as such, leaving to the Corporation Commission its functions of supervision and regulation of public service and other corporations, and created a State Department of Revenue with a Commissioner of Revenue as the head of the department. The powers and duties with reference to assessment and taxation formerly resting in the State Tax Commission were by this act transferred to the Commissioner of Revenue.

For convenience we set forth in appendices to this brief a copy of the material portions of the statutes of North Carolina pertinent to these suits, as follows: Appendix A, Revenue Act of 1919; Appendix B, Revaluation Act of 1919; Appendix C, Act of Extra Session of 1920, approving the revaluation; Appendix D, Revenue Act of 1921; Appendix E, Machinery Act of 1921.

2. *Distribution of Avails of the Ad Valorem Property Tax Between State Government and Local Subdivisions.*

Prior to 1920, in the Revenue Acts, the State took for its own purposes a percentage of the general *ad valorem* property tax, leaving the balance to the subdivisions. Railroads like other persons contributed to State support through the *ad valorem* tax.

In addition, for over twenty years, and until 1920, Schedule C of the Revenue Acts had levied a variety of privilege,

license, and occupation taxes which went to State purposes. The tax on railroads under this schedule was a privilege tax graduated on the gross earnings per mile within the State, in the form in which it appears in sections 77 and 78 of the Revenue Act of 1919. See Appendix A. In the introductory section of the schedule, section 76, it was called a "tax for the privilege of carrying on the business or doing the act named." In section 78 it was called "The annual license tax for operating railroads within the State."

Special privilege taxes were levied upon other special classes of corporations, and then in section 82 two classes of "franchise or privilege" taxes were levied upon general corporations, the first class for domestic corporations, the second, for foreign corporations in general. Section 82 (9) excluded from the operation of these general franchise or privilege taxes, railroads and the other corporations upon which special privilege taxes were imposed by other sections of the schedule.

In the first chapter of Public Laws of 1920, the *ad valorem* tax on property, including railroads, for State purposes was abolished except as to a percentage for the school fund. (See Appendix C.)

To provide additional revenue for the State, in lieu of the portion of the *ad valorem* tax thus relinquished, the rate of privilege tax on domestic and foreign corporations in general was raised from 1/25 to 1/10 of one per cent of their capital stock, various changes were made as to other special classes of corporate privilege taxes, and sections 77 and 78 in which had appeared for many years the provisions for privilege tax on railroads on gross earnings per mile in the State were repealed; section 82 (9) of Revenue Act of 1919

was amended by striking out "railroad" so that railroads should no longer be excluded from the operation of all the subsections of section 82, and a new privilege or franchise tax on railroads was enacted and inserted in section 82 as sub-section 6½.

This new sub-section substituted for the old privilege tax on gross earnings per mile the new form of franchise or privilege tax measured by 1/10 of one per cent of the total *ad valorem* assessment of the property of the railroad within the State, in the form in which it now appears in the Act of 1921, which is the franchise tax attacked in these suits.

In the Revenue Act of 1921, Section 3, the *ad alorem* tax for State purposes was entirely abolished, and it was provided that no tax on any property in the State should be levied for any of the uses of the State government and that taxes levied therein were to raise the revenues for all State purposes. Schedule C of that act brought forward the changes that had been effected by the Act of 1920. The privilege tax on chair and sleeping cars was put in the place of the old Section 77 and Section 78 was marked obsolete. The franchise or privilege tax on railroads stood as Section 82 (6½). (See Appendix D.)

Under the system of taxation now in force, therefore, no part of the *ad valorem* property tax goes to the support of the State government, but it all goes to the support of the localities in which the property has its actual situs, in the case of real property, or its constructive situs, in the case of personal property.

The State government draws its revenues from a number of sources, principal among which are inheritance taxes, income taxes, on individuals and corporations, an excise on

gasoline, the franchise taxes on corporations (the validity of which as to railroads is attacked in these suits), and the great variety of licenses, privilege, and occupation taxes imposed by Schedule B of the Revenue Act and the nature of which are shown by the titles to the various sections which are set forth in Appendix D to this brief.

3. *The Revaluation Act of* 1919 *and the Revaluation of all Property thereunder for* 1920.

The last quadrennial assessment of real property and of railroad property in North Carolina had been in 1915, and the valuations fixed by that assessment were the basis of *ad valorem* taxation for the years 1915, 1916, 1917, and 1918.

The year 1919, therefore, was the time for the regular quadrennial reassessment of such property under the system prevailing. If the ordinary course had been followed this reassessment would have been made as usual under the provisions of the Machinery Act of 1919. But this was not done. The Machinery Act was passed as usual that year, containing the same sections, 64 and 65, pertinent to assessment of railroads, but at the same session of the Legislature was passed the Revaluation Act which provided machinery for the revision of the whole system of property assessment in the State. It was under that act that the assessments here complained of were made.

As in most States, for years all property in North Carolina had been assessed for taxation below its "true value in money" at which the Constitution required it to be taxed.

In an effort to correct this and to bring all assessments up

to the constitutional requirement of true value the Revaluation Act of 1919 was passed. It provided for a complete revaluation of all property, real, personal, and mixed, including of course railroads. (See Appendix B.)

This new valuation was to be used as the basis for computing *ad valorem* taxes for the years 1920 to 1923 inclusive, *provided the assessments made under the act should be approved by the General Assembly* and the tax rates for the State and the subdivisions should be revised by and under rules laid down by the Assembly.

The power to make the revaluation and new tentative assessment of railroad properties, to be submitted to the Legislature for approval, was given to the State Tax Commission in very general terms and with no such detail as to method as Sections 64 and 65 of the Machinery Acts had provided for many years for the regular quadrennial assessments.

The revaluations of real property in general were made by the local boards pursuant to this act and real property in general was raised four times in value on an average. The results of the local revaluations were reported to the State Tax Commission as the State Board of Equalization and by it reported to the Governor for transmittal to the Legislature.

The State Tax Commission proceeded to make the tentative revaluation of the railroad properties (other than property of railroads locally assessed and which has been revalued by local boards) as required by the Revaluation Act. It called upon the railroads as authorized in Section 31 of that Act for figures as to the cost of replacement of their properties. They replied that it was utterly impossible to furnish such figures except at great expense and

time. They did furnish certain figures but made no pretense that they accurately represented the cost of replacement of their properties. (See affidavit of State Tax Commission, Southern Record, 96-101.)

Being unable to procure from the railroads the cost of replacement figures as basis for consideration as authorized by the Revaluation Act, the Tax Commission took the information available which most nearly gauged the cost of replacement, to-wit, the investment account figures. (See affidavit of Tax Commission, and report of Tax Commission to Governor. Seaboard Record, 81-82.)

Taking the investment account figures as the basis, and revising them by a consideration of the various modes and factors theretofore considered in the regular quadrennial assessments under the provisions of Sections 64 and 65 of the Machinery Act, capitalization of net income, value of stocks and bonds, and all other factors influencing the value within the reach of the commission, the Tax Commission arrived at the valuations which it fixed tentatively and reported to the Governor for transmittal to the Legislature for its consideration.

It is to be remembered that these revaluations made by the Tax Commission of railroad property *were not made under and pursuant to the terms of the Machinery Act* but were made pursuant to the special direction by the Legislature in the Revaluation Act, and for the specific purposes therein outlined. The year 1919 would have been the year for a regular quadrennial assessment of real and railroad property. Instead of such regular assessment the Legislature in the Revaluation Act provided that the old assessments for 1918 should be continued as the basis for taxation

for 1919, but that a fundamentally changed and new valuation should be made to be the basis of taxation from 1920 to 1923, inclusive, if approved by the Legislature. (See Appendix B.)

It is further to be remembered that these revaluations of raiload property made by the Tax Commission *were in no sense legal taxation assessments* until they should be approved by the Legislature. The Legislature merely appointed the Commission as its delegated agent to do this work for the Legislature, to fix tentative values and to report them to the Legislature.

The tentative valuations placed upon locally assessed property by local boards and the tentative revaluations placed upon railroads by the State Tax Commission were reported to the General Assembly and by it considered, at a time when the railroads might have been heard before the Legislature if they had so desired, and were made law by the act of 1920 (Public Laws of 1920, Ch. 1). (See Appendix C.) Until the passage of that law they were of no force or effect. *As the assessments of railroad property for taxation for 1920-1923, inclusive, they were made effective and final by the act of the Legislature of North Carolina and not by that of the State Tax Commission.*

Mfg. Co. v. Commissioners, 183 N. C., 553.

By the new assessments enacted by the Legislature of 1920, real property in general in the State was raised an average of three times what it was before; railroad property was only doubled.

More specifically the increase in valuation of all railroad property within the State of North Carolina was 99 per cent,

of real property other than railroad property 296 per cent, and of all property of all classes 194 per cent. (Affidavit of Tax Commission, Southern Record, 101).

It is the assessments of the plaintiffs' property made under this Revaluation Act which are attacked in these suits.

4. *Depression and Reduction of Certain Assessments in 1921.*

A general depression, particularly in the values of farm products, followed almost immediately after the session of the Legislature in August, 1920. The impression was general throughout the State that much real property had fallen in market value below that at which it was assessed under revaluation.

The result was that the Legislature of 1921, in the Machinery Act, Section 28 (*a-g*), provided machinery for review of the revaluation assessments and for correction of the same where they were clearly too high as of 1921, although they had been declared by the Legislature of 1920 to be the basis of taxation for 1920-1923, inclusive. (See Appendix E.)

The discretion in making such review was by this act reposed in the very same bodies who had made the revaluation. As to real property locally assessed, included locally assessed railroad property, the county boards of commissioners and the county boards of appraisers and review appointed under the Revaluation Act sat together as county boards of review.

The State Tax Commission was given the power to review the railroad assessments, upon petition of the railroad. This

power was by the act creating the Department of Revenue in the same session of the Legislature transferred to the Commissioner of Revenue.

This Machinery Act of 1921, however, did not require in any sense a reassessment, either of local property or of railroad property. The county boards of appraisers and review were authorized to meet, not to reassess property, but to investigate and determine whether real property in general in the county had been assessed under the Revaluation Act in 1920 at an amount in excess of its value in 1921, and if so to reduce the assessed values of real property throughout the county by an average percentage reduction.

In addition, to take care of individual differences, these boards were authorized to hear specific complaints by any landowner who found that his land was excessively valued after the general reduction or equalization and to act upon their findings thereon. The same method of procedure was given railroads to petition the State Tax Commission (changed by the Act of 1921 to Commissioner of Revenue) for reduction of their assessments if found to be in excess of actual value as of 1921.

The boards of review in 67 counties, in the exercise of the discretion reposed in them, reduced the real property in those counties by the average percentage reductions which are in evidence. The boards of review in the other 33 counties in the exercise of their discretion refused to make any reduction. No reductions were made in valuation of personal property, and the act of 1921 provided for no such reduction, although the assessments of personal property in the State had been enormously increased under the Revaluation Act.

The plaintiffs, at various times, applied to the Commissioner of Revenue for a review of their assessments. He considered each individual case on its merits. He reduced the assessment of the Norfolk and Southern, upon the showing of over-assessment made by that petitioner. He found that the other plaintiffs made no showing of over-assessment and he refused to reduce their 1920 assessments, which had been approved by the Legislature.

It is this fact,—that the county boards in 67 of the 100 counties of the State, upon showing of depression in their particular counties which had caused land values to be less in 1921 than in 1920, made reductions in the assessments of real property in general in those 67 counties, and that the Commissioner of Revenue found upon the facts submitted to him by the plaintiffs that they had not shown that their railroad system properties were of less value in 1921 than in 1920 (except in the one case in which he did make a reduction, Norfolk-Southern),—which is the basis of the contention of the plaintiffs in these suits that their respective assessments are unconstitutional for discrimination.

And they made this contention although in the 67 counties in which reductions in land assessments were made all railroad property not devoted to transportation purposes and which was therefore assessed by local authorities was reduced exactly like all other land in the county. It was only the railroad system property, assessed centrally under the unit rule, which (except in the case of the Norfolk-Southern) was not reduced.

II.

Summary of facts with reference to the assessments of the properties of the appellants.

As has been said, instead of a new regular quadrennial assessment of property in North Carolina being made in 1919, the Revaluation Act provided that the same assessed valuations which had obtained for the previous four years should be carried forward and be the basis of taxation in 1919 and that the new valuations arrived at in the revaluation of all property should, when approved by the Legislature, be the basis of taxation for 1920, 1921, 1922 and 1923.

The appellant railroads were therefore taxed in 1919 upon the same assessed valuations as in 1918 and the three years before. And they paid property taxes on those valuations without protest or objection.

The revaluation raised all of these assessed values for 1920 and although the appellants did not bring suit to restrain 1920 taxes it does appear that they paid property taxes in that year under protest. It was only in 1921, when the appellants, except the Norfolk Southern, were taxed again upon the 1920 revaluation assessments, and when in certain counties of the State real property in general had been reduced below its revaluation assessment, that the appellants brought these suits alleging that their assessments, too, were excessive and that failure to reduce them was a discrimination against them, although in 33 counties of the State there was no reduction in assessment of any property, although there had been no reduction of tax valua-

tion of any personal property, and although the revaluation itself had not only doubled railroad assessments whereas it had more than tripled real property assessments in general. It is only the taxes for 1921 which are here in litigation, although some of the appellants allege that the assessments in question were excessive and unconstitutional both in 1920 and in 1921.

It is pertinent, however, to see three facts as to each of the appellants: 1. What the 1919 assessment was; 2. What the "revaluation" assessment approved by the Legislature for the years 1920-1923 inclusive was; and, 3. What effect, if any, the petition to the Commissioner of Revenue to reduce the said "revaluation" assessment had in 1921.

The total assessment, both of railroad system property centrally assessed under the unit rule and apportioned and of property not devoted to transportation purposes and therefore locally assessed, as the same had stood since the last previous quadrennial assessment, and as it was carried forward an extra year to be the basis of *ad valorem* taxation for 1919, was for the respective appellants as follows:

Southern	$46,869,942
Atlantic & Yadkin	1,975,806
Seaboard	20,191,720
Atlantic Coast Line	34,645,345
*Norfolk Southern	.....

* (The record does not show what the assessment was prior to 1920 and no point is made by that plaintiff as to comparison between the 1920 assessment and the former assessment.)

Under the revaluation, made tentatively by the State Tax Commission under the terms of Revaluation Act of 1919 and approved by the 1920 Extra Session of the Legislature and thereby made the legal assessment for 1920 to 1923 inclusive, the assessed valuations of the appellants were established as follows:

Southern	$96,605,694
Atlantic & Yadkin	4,104,710
Seaboard	34,768,440
Atlantic Coast Line	50,867,800
Norfolk Southern	27,023,462

Ad valorem taxes were paid by all the plaintiffs in the year 1920 upon the assessments last stated and those assessments stood as the quadrennial assessments of the property of the plaintiffs, to be the basis of ad valorem taxation for the years 1920, 1921, 1922, and 1923 as provided by the Act of 1920 (Appendix C) *except as such assessments should be changed thereafter under the provisions of law.*

The provisions of law under which they might be changed were those contained in the Machinery Act of 1921 (Appendix E, Sec. 28*g*) as amended by the Act of 1921 substituting Commissioner of Revenue for State Tax Commission and which section so amended reads as follows:

> "Any tax payer owning property assessed originally by the State Tax Commission (Commissioner of Revenue) may make application to the State Tax Commission (Commissioner of Revenue) for a review of the assessment of its property in the same manner herein provided for complaint by the prop-

erty owners before the county boards, and the State Tax Commission (Commissioner of Revenue) may hear and determine such complaints."

It is of the first importance to remember that under the laws of North Carolina the Commissioner of Revenue *had no duty* or power with reference to assessment of railroad property for taxation, from the time of the creation of his office in 1921 until the year 1924 or the termination of the force and effect of the quadrennial assessment approved by the Legislature for 1920-1923, inclusive, except such duty and power as was imposed and conferred upon him by the section just above quoted of the Machinery Act of 1921.

This quadrennial assessment for those years had already been made and approved by the Legislature the year before the office of Commissioner of Revenue was created, and upon the creation of that office the Commissioner was not required by statute and had no right or power to make any assessment for taxation until the year 1924. All he had power or duty to do was to hear petitions or applications for review and reduction of the assessment of any taxpayer centrally assessed who might bring before him such application under the said section 28*g*.

He was under no circumstances authorized to raise any assessment. He was under no statutory duty to make any original valuation of his own or to proceed to make any original assessment as his own act. He was merely empowered to hear and pass upon the evidence which might be submitted to him by any complaining taxpayer whose property had been centrally assessed in 1920, and to determine upon that evidence whether that taxpayer's assessment should be reduced.

All of the plaintiffs, however, when they filed their bills of complaint were under a fundamental misconception as to the statutory powers and duties of the Commission of Revenue in 1921, and they all, as the basis of their allegations that the statutory method of assessment had been violated, alleged that the Commissioner of Revenue *assessed their properties* at the amounts stated for the year 1921, and that in doing so he did not follow the method prescribed by the Machinery Act of that year. (Southern Record, p. 9, art. 4; A. & Y. Record, p. 6, art. 4; Seaboard Record, p. 10, art. 6; A. C. L. Record, p. 22, art. 16; Norfolk Southern Record, p. 7, art. 11.)

These allegations are denied by the defendants and they set forth in their answers to the bills the true situation as to the statutory powers and duties of the Commissioner of Revenue for the year in question in these suits, 1921. (Southern Record, p. 36, art. 4; A. & Y. Record, p. 28, art. 5; Seaboard Record, p. 35, art. 6; A. C. L. Record, p. 51, art. 16; Norfolk Southern Record, p. 37, art. 11.)

Upon the allegations and under the statutes it is perfectly clear that no assessments for 1921 were made at all, either by the Commissioner of Revenue or by anybody else; that the assessments involved in these suits were all made under the Revaluation Act of 1919 as tentative valuations by the State Tax Commission, approved in 1920 and made legal valuations by act of the Legislature, and by that act adopted as quadrennial assessments to be the basis of *ad valorem* taxation without the making of any new assessments for the years 1920, 1921, 1922, and 1923.

What the Commissioner of Revenue did in 1921, and all he had the statutory right or power to do, was to entertain the

applications which each of the plaintiffs made to him under section 28*g* of the Machinery Act of 1921 asking him to reduce the said quadrennial assessment as being excessive for 1921, to hear the evidence adduced as to such alleged excess, and to determine the merits of the application in each case.

In the cases of the applications of the Southern, A. & Y., Seaboard, and A. C. L., upon the evidence adduced to prove that the quadrennial assessments were excessive for the year 1921, the Commissioner of Revenue decided in the exercise of the discretion reposed in him by the statute that no excess had been shown and that the said railroads had not shown cause why he should exercise the power to reduce the quadrennial assessment. In the case of those railroads, therefore, the 1920-1923 assessment was carried forward and was left as the basis of taxation for 1921. There is no suggestion in allegation or in proof in any of these cases that the Commissioner of Revenue in passing on these applications to reduce did not act in perfect good faith and in the honest and *bona fide* exercise of his official discretion in passing upon the evidence submitted to him and in refusing to make reductions.

In the matter of the application of the Norfolk Southern for reduction he did decide upon the evidence adduced that the revaluation quadrennial assessment of $27,023,462 was more than the actual value of the properties in North Carolina of that railroad for the year 1921 and accordingly, in pursuance of his only statutory power, he reduced that assessment to $22,840,932, which sum should be the basis of *ad valorem* taxation for the rest of the quadrennial period. The sum of $22,840,932 was not, however, an assessment of

the Norfolk Southern property made by the Commissioner of Revenue for 1921 under the provisions of the Machinery Act of 1921, but was the quadrennial assessment of 1920-1923 made in 1920 under the provisions of the Revaluation Act and reduced by the Commissioner of Revenue in 1921 under the specific power granted him by section 28*g* of the Machinery Act of that year. This distinction is no mere technicality. It has a controlling bearing on the attack which the plaintiffs make on the method of assessment, as we shall see.

As to the particular case of the Norfolk Southern, whose petition for reduction was granted, we shall show in a subsequent portion of this brief that the Commissioner of Revenue not only reduced that railroad's assessment for 1921 but reduced it to one of three figures submitted to him by the Norfolk Southern in the said application as being valuations of its property arrived at by three different possible methods of valuation other than that which had been used in 1920, and that the Norfolk Southern filed no exception to this action of the Commissioner, made no protest against it, but acquiesced in the reduced assessment of $22,840,632 (a reduction of $4,182,530 below the assessment upon which it had paid *ad valorem* taxes in 1920) and continued to acquiesce in it until after the Southern on September 22, 1921, the A. & Y. on the same date, and the A. C. L. on September 26, filed their respective bills attacking the taxation system of the State as applied to railroads. Nearly a month later, on October 17, the Norfolk Southern decided to join in the attack if anything might be gained thereby and filed its bill in the Eastern District of North Carolina. We shall show, therefore, that the Norfolk Southern cannot

be heard in equity to complain of its assessment and *ad valorem* taxes and that the only substantial question in its suit is the same as that in the others as to the franchise tax.

Again, as to the Norfolk Southern no point is made as to increase of the revaluation or 1920-1923 assessment over the prior assessment upon which *ad valorem* taxes were levied in 1919. The only contention of that plaintiff is that the 1920-1923 assessment, as reduced by the Commissioner upon its petition in 1921 from $27,023,462 to $22,840,932, was illegal and unconstitutional although fixed at a sum which we contend was fully acquiesced in by that company.

As to the other appellants the following table shows the assessment upon which *ad valorem* taxes were paid in 1919, the revaluation assessment upon which taxes were paid in 1920, the same assessment as affected by reductions in local property valuations but as unchanged as to centrally assessed property and upon which taxes are levied for 1921 (the taxes here litigated):

	1919.	1920.	1921.
Southern	$46,869,942	$96,605,694	$96,306,357
A. & Y.....	1,975,806	4,104,710	4,104,710
Seaboard	20,191,720	34,768,440	34,768,440
A. C. L.	34,645,345	50,867,800	50,867,800

The figure $96,306,357 upon which assessment the taxes are levied against the Southern for 1921 is less than that for 1920, not by reason of any reduction made by the Commissioner of Revenue of the assessment of railroad system property centrally assessed, for he made none, but by reason of certain reductions in property of that railroad locally assessed, the total assessment being the result of adding locally

assessed property values to centrally assessed property values. As to these four appellants the centrally assessed property stands still at the value assessed under the Revaluation Act in 1920, and it is the legality and constitutionality of those assessments, made under the provisions of the Revaluation Act of 1919, and specifically approved and adopted by the Legislature in 1920, which is attacked in these suits.

III.

Differences between the respective bills of complaint of the appellants.

As to the franchise or privilege tax, discussed in Part II of this brief, there is no substantial difference between the bills of complaint of the respective plaintiffs. They all attack that tax on the same grounds, and in that part of the brief, therefore, there will be no occasion for drawing distinctions between the respective suits.

As to the attack made upon the assessments and the *ad valorem* taxes, however, there are material differences between the various bills of complaint which require attention.

The broadest attacks upon the assessments and property taxes are those made by the Southern and by the Atlantic Coast Line in their respective bills of complaint. Those two plaintiffs present the same points and contentions in their virtually identical pleadings.

They both allege that their property in North Carolina was assessed for 1920 (the revaluation assessment) in excess of its true actual value and that the 1920 property taxes which they paid under protest were therefore illegal and

unconstitutional. They both then allege that the same illegality and unconstitutionality existed as to the 1921 taxes now in litigation since the assessment was still in excess of true actual value.

They further allege that even if the 1920 assessment had been at true value, their properties were not worth as much in 1921 as in 1920, and that therefore it was illegal and unconstitutional to tax them in 1921 upon the same property valuation as in 1920. And they allege that to do so was to discriminate against them in violation of the State and Federal Constitutions by reason of the fact that in a majority of the counties in which they have property the "revaluation" or 1920 assessments of real property in general were reduced under the provisions of the Act of 1921, while the Commissioner of Revenue refused to reduce theirs.

The principal points made by those two plaintiffs therefore are: excessiveness of their assessments as originally made in 1920 and as carried forward in 1921; and discrimination in failing to reduce those assessments for 1921 in proportion to reductions made in tax valuation of other property in the State.

On this phase of the suits, the complaints of the Seaboard and of the Norfolk Southern are much narrower in scope. While the Southern and the Atlantic Coast Line allege that their 1920 assessments were excessive and that their 1921 assessments, not having been reduced, are even more excessive, the Seaboard specifically alleges that in 1920 its property in North Carolina was correctly assessed for taxation, according to law (Seaboard Record, p. 16). Therefore the only complaint which the Seaboard makes against the assessment of its property is that it was not reduced in

1921 by analogy with the reductions of assessments of real property made in certain counties. The complaint of the Seaboard, therefore, presents only two questions: the question of the franchise tax, and the question of discrimination. And the discrimination complained of is that alleged to have been used by the Commissioner of Revenue in his refusal to reduce the assessment upon the Seaboard's petition. Although on the hearing in the district court, the Seaboard sought to argue that there was another kind of discrimination in that for years, as it contended, while its property had been taxed at least at true value, other property in the State had been taxed at less than true value, there is no such allegation in the complaint of that or any other plaintiff.

The Norfolk Southern makes no allegation of discrimination by the Commissioner of Revenue in failing to reduce, for he did reduce that plaintiff's assessment. The only contention of discrimination made by that plaintiff is that while other property in the State is taxed at true value or less than true value, its property is assessed at more than its true value. So that plaintiff's contention as to discrimination is merely a contention of excessiveness of assessment. We have referred to the peculiar facts in its case upon which we contend that it acquiesced in its assessment.

All of the plaintiffs fill a large part of their complaints with allegations of violation of statutory method of assessment of which they contend the Commissioner of Revenue was guilty in *making assessments of their property in 1921,* when the fact is, as we have already shown, that he made no assessments. We shall show that there is absolutely no merit in these contentions as to method.

The case of the Atlantic and Yadkin is unique. That railroad is part of the Southern Railway system. Its entire capital stock is owned by the Southern. For years its property has been assessed together with that of the Southern in North Carolina, and then an apportionment made to it of part of the total. When the 1920-1923 assessment was made this same plan was followed and the total assessment arrived at and approved by the legislature of the properties of the Southern System in North Carolina was $101,960,413. This figure was then handed to Mr. Hubbard, Tax Commissioner of the Southern Railway, and he was asked to work out a proper apportionment of this total between the Southern Railway and the Atlantic and Yadkin. He took this datum to Atlanta with him and worked out an apportionment of the total to each of the roads comprising the Southern System in North Carolina, which apportionment gave to the Atlantic and Yadkin the assessment now complained of, to-wit, $4,104,709. This result he sent to the State Tax Commission with a letter showing that he suggested it as a proper distribution of the total among the component roads of the system (A. & Y. Record, pp. 96-99).

With particular reference to the apportionment to the A. & Y. suggested by him he said:

> "If you feel that any of these values are too high, I would suggest that it would be entirely proper to give a further arbitrary increase to the North Carolina Midland and to the Atlantic and Yadkin, in order to absorb any reduction on the double track."

It results therefore that it was at the suggestion of the Atlantic and Yadkin's own tax commissioner that its assessment was fixed at $4,104,709.

Unless, therefore, the Southern has shown that the assessment of the whole of the properties of the Southern System at $101,960,413 was illegal and unconstitutional and should be enjoined the Atlantic and Yadkin has no standing to complain of its assessment and *ad valorem* taxes. Its suit will succeed or fail with that of the Southern.

The suits, with reference to differences in the bills of complaints as to assessments and property taxes, fall therefore naturally into three groups: *First,* the Southern and the Atlantic Coast Line, with the Atlantic & Yadkin as a dependent satellite to the Southern; *second,* the Seaboard, contending that its revaluation assessment was right in 1920 and only complaining of discrimination in that it was not reduced in 1921; and *third,* the Norfolk Southern complaining that its assessment was excessive even after it had been reduced in 1921 to a sum in which we say it acquiesced.

We repeat that as to the question of the franchise tax all five suits are identical.

IV.

The plaintiffs have made no showing of illegality on their allegations of violation of statutory method.

1. *The contentions of the plaintiffs as to method.*

The first argument of the plaintiffs met in these cases is one addressed not to any consideration of constitutionality but to a pure question of legality of the assessments under

the statutes of North Carolina. This argument is made with great variety and in great detail and the major portion of each of the bills of complaint is devoted to its elaboration.

As the basis for it the plaintiffs quote Sections 64 and 65 of the Machinery Act of 1921, and the identical sections of the Machinery Act of 1919.

The plaintiffs contend then that the State Tax Commission made an assessment of their property in 1920 under the provisions of those sections of the Machinery Act of 1919 and that in making it the Commission violated the provisions of those sections with reference to the method of assessment prescribed; they further contend that in 1921, when a later statute had substituted in those sections "Commissioner of Revenue" for "State Tax Commission," the said Commissioner of Revenue *made an assessment* of their property for 1921 under the provisions of the said sections of the Machinery Act of 1921 as amended, and that in making it he violated the provisions of those sections with reference to the method of assessment prescribed.

The various respects in which it is contended that the State Tax Commission in 1920 and the Commissioner of Revenue in 1921 violated those sections in making an assessment of the property of the plaintiffs are as follows: That there was no separate assessment of tangible and intangible property, or if so plaintiffs were not notified as to what that separation was; that no due consideration of the actual cost of replacement of the property, with just allowance for depreciation of rolling stock, was given; that the franchise or intangible property value was not assessed by a due consideration of the gross earnings as compared with the operating expenses,

or of the market value of the stocks and bonds; that the particular method of assessing interstate roads prescribed in Section 65 was not followed.

And the plaintiffs endeavor to prove that the statutory method prescribed in those sections was not followed by making a comparison of their actual assessments with what they contend to be the cost of replacement of their property (as shown by the *tentative* figures of the Interstate Commerce Commission), with capitalization of their net earnings at 8 per cent (they contending that 6 per cent, the legal rate in North Carolina, is an illegal percentage at which to capitalize), with quoted values of their stocks and bonds at given times, and with various other figures and sums which they contend might be valuations of their properties in North Carolina arrived at by other methods than that which they contend was followed by the State Tax Commission and by the Commissioner of Revenue.

We repeat that all these arguments of the plaintiffs address themselves to no consideration of constitutionality but merely to the question of legality under State statutes, and that all these arguments are based on two premises, to-wit: *First*, that the State Tax Commission in 1920 and the Commissioner of Revenue in 1921 made assessments for taxation of the property of the plaintiffs; and *second*, that those respective assessments were made under the provisions of the said sections of the respective Machinery Acts for those years and in order to be legal were required to be made in compliance with the statutory method prescribed by those sections.

2. *The State Tax Commission in* 1920 *and the Commissioner of Revenue in* 1921 *Made No Assessments.*

All those contentions of the plaintiffs fall to the ground when we see that their first premise fails, that neither the State Tax Commission in 1920 nor the Commissioner of Revenue in 1921 made assessments of the properties of the plaintiffs and that the assessments here complained of were in no legal sense the act of that board or that officer.

We have already shown that the assessments complained of in these suits were not made pursuant to the provisions of the regular Machinery Acts as usual, but that in 1919 the Legislature passed the Revaluation Act which provided special machinery for a complete revaluation and reassessment of all the property in the State and that the assessments here involved were made under the particular provisions of that act.

Section 2 of that act provided:

> "That for the purpose of making a complete list of all the property of every citizen of the State, real, personal, and mixed, and of having all of such property valued in accordance with the rule laid down in the Constitution of the State at its true value in money, and to be adopted and used as the basis of all taxes levied by the State, counties, cities, towns and other taxing districts of the State for the year one thousand nine hundred and twenty, *the machinery hereinafter set out is provided.*" (Italics ours.)

Section 3 thereof provided:

> "The assessment made under the provisions of this act *shall not be used as the basis for computation of taxes unless and until the same has been approved by*

the General Assembly and until the tax rates levied by the State have been revised by the General Assembly, and the tax rates levied by the counties, cities, towns, and special tax districts of the State have been revised under the rules to be laid down by the General Assembly * * *" (Italics ours.)

And the particular directions for the revaluation of railroad property were contained in Section 31 of that act as follows:

"Sec. 31. *Railroads, telegraph, telephone, street railway companies.*

"As of the first day of May, one thousand nine hundred and nineteen, the State Tax Commission *shall make a complete revaluation of the property of all railroad,* telegraph, telephone, and street railway *companies,* to be used as the basis for computing taxes for such companies *for the years one thousand nine hundred and twenty, one thousand nine hundred and twenty-one, one thousand nine hundred and twenty-two, and one thousand nine hundred and twenty-three,* such revaluation to be made in accordance with the general rule and intent and purpose of this act as to all other property. The commission shall have the right to require all information required by chapter two hundred and thirty-four of the Public Laws of one thousand nine hundred and seventeen to be furnished by such companies, and also a sworn estimate, by a responsible officer of every such company of the *cost of reproduction* of the properties of such companies new, including sidetracks, doubletracks, and all properties owned by such companies in this State, *less reasonable depreciation for such of its properties as have depreciated in value,* and shall also include the *present value of all real estate used as rights of way,* including depot sites, yards, terminals, and

> otherwise. All properties of this class that have been operated by the United States Government shall report the earnings during such period of operation and also the compensation paid, or agreed to be paid, for their use, and if no agreement has been made, the amount of compensation asked for by the owners." (Italics ours.)

What the Legislature did, therefore, was to delegate to local boards the power to revalue properties theretofore locally assessed, and to delegate to the State Tax Commission the technical work of revaluing the property of railroads and others centrally assessed. But these bodies did not make legal taxation assessments. They made valuations, under the rules prescribed by the Revaluation Act, which were to take effect as taxation assessments ("to be used as the basis for compensation of taxes") only when approved by the General Assembly.

The revaluation of the properties of the plaintiffs was made by the State Tax Commission pursuant to this act and was by it reported to the General Assembly, which approved the same and made the valuations arrived at effective as taxation assessments by Chapter 1, Public Laws, Extra Session 1920, as follows:

> "The General Assembly of North Carolina do enact:
>
> "Section 1. That the assessment or valuation of property made under the provisions of chapter eighty-four of the Public Laws of one thousand nine hundred and nineteen is hereby approved by the General Assembly and adopted as the basis for the levy of tax rates by the State and by all subdivisions of the State for which taxes are levied for the year one thou-

sand nine hundred and twenty, and the valuation of real property so fixed shall be adopted for the years one thousand nine hundred and twenty-one, one thousand nine hundred and twenty-two, and one thousand nine hundred and twenty-three, except as such valuations may be hereafter changed according to law."

It was not the act of the State Tax Commission but the foregoing act of the Legislature of North Carolina which breathed the breath of life into the revaluation of the plaintiffs' properties and made them effective as assessments, the basis of taxation.

As we have already shown, the Commissioner of Revenue made no assessment of the plaintiffs' properties in and for 1921. The valuations adopted by the Legislature and by it made assessments, the basis of taxation, were so adopted and made by it for the years 1920, 1921, 1922, and 1923. It required no act of the Commissioner of Revenue to make assessments in 1921. They were already made and approved by the Legislature for the quadrennial period. No new assessments were authorized or required to be made until 1924. This was the status when the office of Commissioner of Revenue was created in 1921. It is true the Machinery Act, as amended, of that year carried the same Sections 64 and 65 which are always carried in it, and which prescribe a method for assessment of railroad properties by the Commissioner of Revenue "at such dates as real estate is required to be assessed for taxation." But there have been no such dates since the year before his office was created. And there will be no such dates until 1924, for assessments for the entire four-year period prior to that year have already been made

and approved by Act of the General Assembly before the office of Commissioner of Revenue was created.

It is perfectly clear that the defendant Commissioner of Revenue made no assessments in 1921 and will not make any until 1924, and that until that date he will never be under the requirement of following the statutory method of assessment set forth in Sections 64 and 65 of the Machinery Acts if they are still in effect in 1924.

It results that neither the State Tax Commission in 1920 nor the Commissioner of Revenue in 1921 made any of the assessments complained of. There is no basis in fact or in law, therefore, for the contention that any assessment by the said Commission or the said Commissioner was illegal.

3. *The Allegations of the Plaintiffs that the Assessments are Illegal as Not having Been Made in Compliance with Statutory Method are Without Merit.*

We contend in the first place that it is clear that the assessments in question were made under the provisions of the Revaluation Act and in accordance with every requirement thereof.

But in any case the complete answer to all the plaintiffs' contentions as to illegality for violation of statutory method is to be found in the undisputed fact that, whoever made the valuations of the paintiffs' properties now in question as assessments, and under whatever statute they were made, the Legislature of the State adopted and approved those valuations by the Act of 1920, and gave them effect as assessments for the four years following.

The General Assembly of North Carolina made these

valuations to be assessments for 1920-1923 and the Legislature can not be bound by its prior statutes to follow them in its subsequent enactments. The Legislature cannot be charged with acting illegally. *It is the author of law.*

The State's power to tax is a sovereign power. This power is supreme except as restricted by constitutions. This sovereign power is reposed in the Legislature. The extent to which it shall exercise the power to tax, the subjects upon which it shall be applied, and the *method or mode* in which it shall be exercised, are entirely within the discretion of the State Legislature.

McCulloch v. Maryland, 4 Wheat., 316.
Lane County v. Oregon, 7 Wall., 71.
Shaffer v. Carter, 252 U. S., 37.

In *Lane County v. Oregon, supra,* speaking of this power of the States, it is said:

> "In respect, however, to property, business, and persons, within their respective limits, their power of taxation remained, and remains entire. It is, indeed, a concurrent power, and in the case of a tax on the same subject by both governments, the claim of the United States, as the supreme authority, must be preferred; but with this qualification it is absolute. The extent to which it shall be exercised, the subjects upon which it shall be exercised, and the mode in which it shall be exercised are all equally within the discretion of the Legislature to which the States commit the exercise of the power. That discretion is restrained only by the will of the people expressed in the State Constitutions or through elections, and by the condition that it must not be so used as to burden or embarrass the operations of the National Government."

In the recent case of *Shaffer v. Carter, supra,* it was said to the same effect:

> "All subjects over which the sovereign power of the State extends are objects of taxation. * * * These subjects are persons, property, and business. * * * It (taxation) may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the Federal Constitution, the power of the States as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction. *State Tax on Foreign-held Bonds,* 15 Wall., 300, 319. See also *Welton v. Missouri,* 91 U. S., 275, 278; *Armour & Co. v. Virginia,* 246 U. S., 1, 6; *American Mfg. Co. v. St. Louis,* 250 U. S., 459, 463."

Of what importance is the question of method in tax assessments? Only this:

This power can only be exercised by the Legislature or by delegation from the Legislature. If the Legislature delegates the power to make assessments to a board, or commission, or officer, and prescribes a method by which it or he shall make the assessment, the assessment must be made by the use of that method. If the delegated power to assess is not exercised according to the method prescribed by the sovereign Legislature, then the assessment is not a *legal* assessment and the tax thereon is not a legal tax. This has nothing whatever to do with constitutionality.

If the Legislature, however, chooses to approve the work of a board to which the power of valuation or assessment is delegated, it cannot be restricted to approving any particular

sort of method. The method is in the discretion of the Legislature. It has the power to approve any method which may have been used, and if the board may have even directly violated a previously prescribed statutory method, the approval of its act by the Legislature purges it of any illegality.

The Legislature of North Carolina, instead of leaving the legal assessments to be made by boards with delegated powers, and prescribing the methods in which it should be done by them, merely delegated to them the power to make tentative valuations to be reported to the Legislature itself. These valuations, whether of the county boards or of the State Tax Commission, had no legal effect. The Legislature then took the valuations reported to it, considered them, and made them law in the act of 1920. They were made effective by the act of the General Assembly, not by the act of the county boards nor of the State Commission. They were not made pursuant to law. *They were law. They cannot be illegal.*

All the strained *minutiæ* into which the complaints and the arguments of the plaintiffs run in an effort to show that the revaluation assessments made by the Legislature were not made in compliance with the methods laid down in Sections 64 and 65 of the Machinery Act result in arguing that the Legislature in enacting the act of 1920 did not follow the provisions enacted by itself in the Machinery Act of 1919, the year before. All of these arguments are based on the false assumption that the State Tax Commission did something which had legal effect. Its work was purely advisory.

There is no possible question of method or of illegality of 1921 assessments. There are no 1921 assessments. There are only assessments enacted by the Legislature in 1920 to

last for four years. The Commissioner of Revenue has made no assessments and had no right or power to do so. He has never had, and will never have, to follow the methods of assessment outlined in the Sections 64 and 65 of the Machinery Act until 1924. The only statutory provision governing his action in reviewing the 1920 assessments is section 28 (*g*).

We may dismiss all questions of illegality of assessments and of violation of statutory method from further consideration in these suits. Only constitutional questions remain.

V.

The plaintiffs have no standing in court to attack their assessments, or to seek injunction to restrain their ad valorem taxes levied thereon, since none of the bills attack or allege to be unconstitutional the Act of 1920 which approved and made effective those assessments.

In view of what has been shown above, an examination of the bills of complaint will show that not one of them contains any allegations upon which the question of the validity or constitutionality of assessments is properly before the court.

They are all drawn with a misconception of fundamental facts as to how the assessments complained of were made and allege that acts of the State Tax Commission and of the Commissioner of Revenue in making assessments were illegal and unconstitutional, but there is nowhere any allegation attacking the Act of the Special Session of 1920 (chapter 1) which was the act of the Legislature adopting and approving the assessments here attempted to be challenged.

Even though adopted and made effective by the Legislature assessments must of course be in accordance with

the State and Federal Constitutions, but the constitutionality of an assessment approved and made effective by statute of the Legislature can only be brought in issue in suits in equity by allegations of the unconstitutionality of that statute under either the State or Federal Constitution.

The plaintiffs do not allege that the Act of 1920 was unconstitutional or deprived them of any constitutional right. The question of the validity of that statute is in no way raised in any pleadings in these suits. The assessments are valid as long as the Act of the Legislature approving them stands, and it stands until attacked as unconstitutional by proper allegation in complaint.

On this ground alone the District Courts were right in refusing to grant injunctions to restrain the collection of *ad valorem* property taxes. There were no allegations to support their jurisdiction to grant that relief. As to that relief there was no equity in the bills of complaint.

We shall, nevertheless, proceed to show that even if the question of the constitutionality of the assessments had been properly before the District Courts the plaintiffs showed no case for the granting of injunction on the ground of unconstitutionality.

VI.

The plaintiffs have made out no case for equitable relief, under either State or Federal Constitutions, on their allegations of excessive assessments.

The plaintiffs contend that the assessments upon which *ad valorem* taxes are levied against them by North Carolina are excessive and that they therefore violate the true value clause of the State Constitution and the Commerce Clause

and the Due Process Clause of the Fourteenth Amendment of the Federal Constitution.

We shall first discuss the general principles governing questions of constitutionality as to amount of taxation assessments under all these constitutional provisions and show that under none of them have the plaintiffs presented cases raising any question of constitutionality, or showing any equity to support the prayer for injunction.

We shall then give particular attention to the plaintiff's contentions of unconstitutionality under the Fourteenth Amendment and to their contention of unconstitutionality under the commerce clause. And we shall undertake to show that as a matter of fact, upon the pleadings and evidence there has been no overassessment of the properties of the plaintiffs.

1. *Assuming that the assessments are excessive as alleged, there is nothing in these suits that would justify the court in enjoining collection of taxes thereon as being unconstitutional.*

Remembering that the assessments in question were those approved by the Legislature of North Carolina by the Act of 1920, we see that they were based on new valuations of the property of the plaintiffs made by the State Tax Commission under the terms of the Revaluation Act. This Commission is an administrative and quasi-judicial body composed of three men, all experts with long training and experience in the tax valuation of railroads and other public utility companies in North Carolina. (Southern Record, 99.)

They made their tentative valuations and reported them to the General Assembly at a time when the plaintiffs could have appeared and been heard before the appropriate committee of the Legislature, and could have offered there any evidence they might have had of mistake on the part of the Commission or overvaluation of their property. These valuations were considered in the public sessions of the Legislature and were by act of that Legislature approved and adopted as taxation assessments, made the basis of taxation, for four years.

The first year, 1920, the plaintiffs all paid taxes on the said assessments. The second year, 1921, they all bring suits in the Federal courts to restrain their collection, alleging that said assessments are excessive and hence unconstitutional.

But in their bills of complaint they nowhere allege that the State Tax Commission, in making the tentative valuations which were made assessments by the Legislature, acted with anything other than the utmost good faith and the exercise of the best judgment of its members doing the work. There is nowhere any allegation of fraud. There is nowhere any allegation of deliberate or intentional overvaluation of the property of the plaintiffs. There is nowhere any allegation of a purpose, plan, or agreement among the members of the Commission to place excessive valuations on the property of the palintiffs. There is no allegation, and no suggestion or intimation in the proof, that any facts were hidden, that any undue influence was exerted upon the Commission or by it or any one else upon the Legislature. There are no such allegations even as those which appeared in the bill of complaint in the case of *Chicago, etc., R. Co. v.*

Babcock, 204 U. S., 585, that the board was induced by political clamor and fear arbitrarily to fix excessive assessments, or that they acted under political duress and in pursuance of a fraudulent scheme.

Taking the bills most favorably for the plaintiffs their allegations as to excessiveness of assessments amount to nothing more than a charge that the assessments are erroneous and are the result of mistakes and errors of judgment on the part of the commission which did the technical work of valuation, and that taxes levied thereupon are consequently burdensome and oppressive upon the plaintiffs.

The Federal courts are not a harbor in which can be found refuge from ill-advised, unequal, and oppressive State legislation.

Mobile County v. Kimball, 102 U. S., 691;
Magoun v. Ill. Trust and Sav. Bank, 170 U. S., at 293.

In the *Magoun Case, supra,* it was said by Mr. Justice McKenna:

> "Nor with the impolicy of a law has it (the Supreme Court of the United States) concern. Mr. Justice Field said, in *Mobile County v. Kimball,* 102 U. S., 691, that this court is not a harbor in which can be found a refuge from ill-advised, unequal and oppressive State legislation. And he observed in another case: 'It is hardly necessary to say that hardship, impolicy or injustice of State laws is not necessarily an objection to their constitutional validity.'"

If there is nothing more than mere irregularity in valuation and assessment proceedings, injunction will not lie.

Adams Express Co. v. Ohio, 165 U. S., 229;
Covington v. Rockingham, 93 N. C., 134;
Elliott on Railroads, 3rd Ed., Sec. 904, cases cited.

As to the method of making an assessment, it cannot be mathematically accurate. Various elements enter into the valuation, and all that is required is the exercise of an honest judgment, based upon the information at hand or obtainable.

Brooklyn Street Railway Co. v. New York, 199 U. S., 48.

The courts will not review a mere error of fact in assessment of property for taxation, where a lawful principle was followed and no fraud is charged.

Pittsburgh, etc., R. Co. v. Backus, 154 U. S., 421;
Western Union v. Taggert, 163 U. S., 1, 36;
Adams Express Co. v. Ohio, 165 U. S., 229.

In the case of *Western Union v. Taggert, supra,* it was said:

> "The allegation that 'the attempted and pretended valuation of complainant's said property by said State Board of Tax Commissioners, in manner aforesaid, necessarily includes, and does in fact include, values which are not a part of the true cash value of the property of complainant in Indiana,' is but the equivalent to an assertion that the decision of the tax commissioners upon the question of fact committed by the statute to their determination was erroneous. As said by this court in *Pittsburgh, etc., R. Co. v. Backus,* above cited, 'Whenever a question of fact is thus submitted to the determination of a special tribunal, its decision creates something more than a mere presumption of fact, and if such determination comes into inquiry before the courts it cannot be overthrown by evidence going only to show that the fact was otherwise than as so found and determined.'"

The same language was quoted and approved again in the case of *Adams Express Co. v. Ohio,* 165 U. S., at 229.

All valuation of property for taxation is a matter of opinion. An assessing board may act on its own knowledge of conditions, circumstances, and values, as well as upon evidence designated by statute, and a court cannot substitute its opinion for that of the board to which the Legislature has granted the discretion, by seeking to review the exercise of that discretion.

State Railroad Tax Cases, 92 U. S., 610.

Therefore, courts have nothing to do with allegations of absurd, excessive, or mistaken calculations of an assessing board or officer. They can only act on proof of fraud, or of a clear adoption of a fundamentally wrong principle.

Chicago, etc., R. Co. v. Babcock, 204 U. S., 596.

In that case the court said:

> "It is said that this valuation is absurd and due to misunderstanding of the table (a table of market values of stocks and bonds). But we have nothing to do with complaints of that nature, or with anything less than fraud, or a clear adoption of a fundamentally wrong principle."

The law is well settled, therefore, that a court of equity, and particularly a Federal equity court, will not hear complaints that State taxation is harsh, oppressive, ill-advised; that errors have been made in assessment of property; that the assessments are in fact too high.

The assessments complained of in these suits go back to

valuations honestly made by a board of competent experts, made in the utmost good faith and in the exercise of their best judgment, taking all of the allegations of the plaintiffs most strongly against the defendants, and made without any sort of intention to value the property of the plaintiffs at more than true value, without any sort of scheme or plan to be unjust to the plaintiffs.

The work of this quasi-judicial body, done by it by appointment and direction of the State Legislature, creates, as was said in the *Taggert Case, supra,* something more than a mere presumption of fact, and when that work comes in inquiry before the courts, it cannot be overthrown by evidence going only to show that the fact as to the values of plaintiffs' property was otherwise than as found and determined by the State Tax Commission.

And yet in these cases the District Courts were, and this court is now, asked to overthrow this work upon allegations merely that the fact as to value is otherwise than as found by the Commission, and upon proof which the plaintiffs themselves can contend only tends to show that the Commission made an error of judgment in arriving at the value found.

In these cases we have even more. Not only was the fact as to value determined by the quasi-judicial body, the Commission, with perfect honesty and in the exercise of its best judgment, but these values were publicly reported to the General Assembly of North Carolina, where they were the subject of discussion in the halls of the Legislature and before the committees thereof, where the plaintiffs were privileged to be heard to complain of them if they had seen fit, and the Legislature proceeded by statutory enactment to put

its seal of approval on the said valuations and adopted them as the basis of *ad valorem* taxation.

And it is the exercise, therefore, not only of the honest discretion of the Tax Commission, but of the deliberate judgment of the Legislature itself which the plaintiffs ask the courts to overthrow in these cases and for which they ask the courts to substitute their judgment as to the fact of value.

All valuations are matter of judgment and opinion. Mathematically accurate valuations cannot be expected to be arrived at under any system depending upon the frailties of human nature, and circumscribed by the limitations set by nature upon the human mind. And any system of law or administration is necessarily dependent upon those frailties and circumscribed by those limitations. If the officials of North Carolina, upon complaint of the plaintiffs, had reduced each of their assessments by one-third, the plaintiffs could still bring forward plausible arguments tending to show that in fact the value of their property was lower still. And the State officials could still adduce plausible contentions that the respective values were even higher than the original assessments. It would all still be matter of opinion and honest judgment and discretion upon human proofs and evidence.

The power to make this judgment and to exercise this discretion must be lodged somewhere. It is not lodged in the courts. They have no power to value property and to lay the basis for taxation. The power is lodged primarily in the legislative branch of the State governments, under our system of government, and secondarily in such administrative and quasi-judicial bodies and officers as may be granted

by the Legislature a delegation of this power. In these suits we are concerned with the results of an honest exercise of this power, not only by the subordinate body, but by the Legislature itself.

If the plaintiffs had shown, or attempted to show, that in assessing their property either the Legislature or its subordinate bodies had, as in the case of *Greene v. Louisville, etc. R. Co.*, 244 U. S. 499, intentionally, deliberately, systematically, and in pursuance of a fixed plan, taken a higher percentage of what was deemed to be the value of the property of the plaintiffs than the percentage taken for other property, we should have a case of deliberate overassessment which would raise a constitutional question and might raise equity to support prayers for injunction. But there is absolutely nothing of the kind in either allegation or proof in these suits.

It results that there are no allegations and there is no evidence in these suits, or any one of them, sufficient to raise any constitutional question as to overassessment of the plaintiffs' property for taxation, or sufficient to raise any equity to support the prayers for injunction, under any constitutional provision.

2. *In particular there is nothing in these suits to raise any question of constitutionality of the assessments under the Fourteenth Amendment.*

The valuations of the plaintiffs' property in question were made largely upon the basis of information contained in reports submitted by the plaintiffs themselves. They had an opportunity to be heard before the State Tax Commission

and again before the Legislature. The next year, 1921, each of them petitioned the Commissioner of Revenue for a rehearing and review under the provisions of statute law, and each of them was twice given a full hearing at which they adduced proofs and submitted briefs and arguments. In the case of one of them the assessment was reduced, upon the basis of the proofs submitted at the hearing, more than four millions of dollars. The Commissioner decided in the other cases, in a perfectly *bona fide* exercise of his official discretion, that no sufficient evidence had been adduced to justify him in reducing the assessment approved and adopted in 1920 by the Legislature. There is no pretense that the plaintiffs were not given every opportunity to be heard, that they were not heard, or that the decision upon the hearing was not a *bona fide* exercise of discretion.

Yet the plaintiffs contend that by reason of excessive assessments of their property the taxes levied thereon constitute a taking of their property without due process of law in violation of the Fourteenth Amendment.

As to the question of due process it is beyond argument settled that due process of law is had where the valuation of railroad properties is made on reports filed by the company, where after valuation notice is given to the taxpayer and a date is fixed for hearing complaints, where hearing may be had with testimony taken and full investigation and where review may be had by writ of *certiorari*.

Brooklyn, etc., R. Co. v .New York, 199 U. S. at 52.

It is alleged in the answers that the writ of *certiorari* would lie to bring up for review in the Superior Court of North Carolina any proceedings of the Commissioner of

Revenue whereby the plaintiffs' legal or constitutional rights may be deemed to be violated. (Southern Record, p. 52). There is no allegation or proof on the part of the plaintiffs to the contrary.

The writ of *certiorari* is specifically authorized by the Consolidated Statutes of North Carolina, section 630, as follows:

> "Writs of *certiorari, recordari,* and *supersedeas* are authorized as heretofore in use. The writs of certiorari and recordari, when used as substitutes for an appeal, may issue when ordered upon the applicant filing a written undertaking for the costs only; * * *."

And the Supreme Court of North Carolina holds that *certiorari* is the proper remedy whereby matters adjudged, decreed, or ordered by inferior tribunals and quasi-judicial commissions may be bought up for revision where no appeal is provided by law.

State v. Tripp, 168 N. C. 150;
In re Hinson, 156 N. C. 250;
State v. Webb, 155 N. C. 426;
Hillsboro v. Smith, 110 N. C. 417;
Smith v. Cheek, 50 N. C. 213;
Thompson v. Floyd, 47 N. C. 313;
Brooks v. Morgan, 27 N. C. 481;
Collins v. Haughton, 26 N. C. 420;
Matthews v. Matthews, 26 N. C. 155;
Dougan v. Arnold, 15 N. C., 99;
Allen v. Williams, 2 N. C., 17.

In the case of *State v. Tripp, supra,* it was said:

> "Both under our Constitution and statutes the writs of *certiorari, recordari* and *supersedeas* 'as heretofore in use,' have full vigor in this State (Constitution, Art. IV, sec. 8, and Revisal, sec. 584), and whenever a substantial wrong has been done in judicial proceedings, giving a litigant legal right to redress, and no appeal has been provided by law, or the appeal that is provided proves inadequate, the Supreme Court, under the constitutional provision, to all courts of the State and the superior courts of higher jurisdiction, by reason of the statute (and well sustained precedents), to all subordinate courts over which they exercise appellate power, may issue one or more of these important writs and under it see that the error is corrected and justice duly administered."

And that the applicability of the writ of *certiorari* is not confined to courts technically speaking, but that it will issue from the superior court also to commissions and such quasi-judicial bodies and officers is not subject to question, for in the case of *Hillsboro v. Smith, supra,* it was held that the writ would lie from the superior court to a board of county commissioners. The town of Hillsboro appeared before the board of county commissioners and objected to the granting of a license to sell liquors to one Smith. The board granted the license. No provision of law gave the right of appeal from the board of county commissioners. The Supreme Court held that *certiorari* would lie to bring the matter up for review by the superior court. It was said by the court in that case:

> "The town, having been thus treated as a party to the proceeding, very clearly had a right to have the action of the board of commissioners reviewed, and, as no appeal lies from that body in a case like the present, the writ of *certiorari* was properly granted."

So we see that every element referred to in the case of *Brooklyn, etc., R. Co. v. New York,* 199 U. S., at 52, is present in these cases and that there can be no question that as to the making of the assessments due process of law has been had.

The facts of these suits comply fully with the requirements of due process as laid down by this court in the leading case of *Davidson v. New Orleans,* 96 U. S., 97, 104, as follows:

> "That whenever by the laws of a State, or by State authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole State or for some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections. It may violate some provision of the State Constitution against unequal taxation; but the Federal Constitution imposes no restraints on the States in that regard."

Even if the plaintiffs had not had an opportunity to be heard before the State Tax Commission in 1920 and before the Legislature in the same year, and even if they had not had the opportunity to be heard twice, as they were in fact, before the Commissioner of Revenue in 1921; even if they had only had one rehearing on the assessment before him, with full opportunity to adduce proofs and file briefs and make arguments, and if they had had no right to the writ of *certiorari* to have the Commissioner's decision reviewed, still under the well settled decisions of this Court it could not be successfully contended that there had been any denial of due process of law.

One hearing is sufficient to constitute due process, and a State statute giving a State assessing board power to correct valuations, naming time and place at which any person interested may be heard, does not deprive the persons assessed of their property without due process of law, because those parties do not have further opportunities to be heard by a court or the Legislature.

Michigan Central R. Co. v. Powers, 201 U. S., 245.

As applied to matters of taxation, it has been uniformly held that any system which gives to the party any means of questioning the validity or amount of the tax at some stage of the proceedings, either before it is determined and fixed or to contest subsequent proceedings for collection, is due process.

State Railroad Tax Cases, 92 U. S., 575, 610.
McMillan v. Anderson, 95 U. S., 37.
Kentucky Railroad Tax Cases, 115 U. S., 321.
Winona R. R. v. Minnesota, 159 U. S., 537.

Pittsburgh, C. C. & St. L. R. v. Board of Public Works, 172 U. S., 45.
Weyerhauser v. Minnesota, 176 U. S., 556, 557.
Voight v. Detroit, 184 U. S., 122.
King v. Portland City, 184 U. S., 69, 70.
Turpin v. Lemon, 187 U. S., 58.
Glidden v. Harrington, 189 U. S., 259, 260.
Leigh v. Green, 193 U. S., 88.
Cass Farm Company v. Detroit, 181 U. S., 396.
French v. Barber Asphalt Co., 181 U. S., 324.
Tonawanda v. Lyon, 181 U. S., 389.
Detroit v. Parker, 181 U. S., 399.

Taxation of an interstate carrier under the unit rule is not taxing property outside of the State and is not taking property without due process of law.

Delaware Railroad Tax, 18 Wall., 206.
Erie Railroad v. Pennsylvania, 21 Wall., 492.
State Railroad Tax Cases, 92 U. S., 575.
Pullman Palace Car Co. v. Pennsylvania, 141 U. S., 18, 22.
Columbus Southern Railway v. Wright, 151 U. S., 470.
Adams Express Co. v. Ohio, 165 U. S., 194, 226.

This question of validity of State taxes under the Fourteenth Amendment has been recently reviewed by this Court in the case of *Dane v. Jackson,* 256 U. S., 589, wherein the court cites numbers of the cases involving the relation of the Federal courts to the taxing systems of the States and the constitutionality of State taxes under the Fourteenth Amend-

ment, and the court succinctly summarized the law of those cases as follows:

> "Where, as here, conflict with Federal power is not involved, a State tax law will be held to conflict with the Fourteenth Amendment only where it proposes, or clearly results in, such flagrant and palpable inequality between the burden imposed and the benefit received, as to amount to the arbitrary taking of property without compensation—'to spoliation under the guise of exerting the power of taxing.' For other inequalities of burden or other abuses of the State power of taxation, the only security of the citizen must be found in the structure of our Government itself."

As the court said in that case, so in these suits "the application of this summary of the law renders our conclusion not doubtful." There is nothing in any of these suits, either in the bills of complaint, in any of the proofs adduced, or in any possible inferences therefrom, which can bring them within the rule announced in *Dane v. Jackson,* or justify the court in holding that *ad valorem* taxes levied by North Carolina upon the basis of the assessments complained of in these suits propose, or clearly result in, such flagrant and palpable inequality between the burden imposed and the benefit received, as to amount to the arbitrary taking of property without compensation—*to spoliation under the guise of exerting the power of taxing.*

One concrete example is sufficient to show, not only that the plaintiffs have not brought their cases within this rule, but that the whole showing of proof is conclusive that there is no violation of the Fourteenth Amendment in the amount

of these assessments. The Seaboard, as we have already shown, in its bill of complaint specifically alleges that in 1920 its property was assessed for taxation at its true value, the assessment being $34,768,440. That plaintiff's only contention as to amount of assessment is that between 1920 and 1921 the true value of of its properties was so reduced that in the latter year $34,768,440 was such an excessive assessment of its properties as that taxes levied at the universal rates on that assessment would constitute a taking of property without due process of law in violation of the Fourteenth Amendment.

On the face of it it is impossible that that railroad's property could have so diminished in value in one short year as that taxes levied on an assessment that was correct the year before could in 1921 amount to confiscation, the taking of property without compensation, *spoliation* under the guise of taxation.

Or take the more striking case of the Norfolk Southern. That company paid taxes in 1920 upon an assessment of $27,023,462, and though it filed a formal protest against the payment it took no action, brought no suit, sought no injunction to restrain collection. It could not have thought that such taxes, although they might be too high as it contended, amounted to confiscation and spoliation under the Fourteenth Amendment. In 1921 the Commissioner of Revenue, upon the application of that plaintiff, reduced the assessment from $27,023,462 to $22,840,932. Then when taxes were about to be levied on the reduced assessment, and after the suits of other plaintiffs had been brought attacking the tax system of North Carolina, the Norfolk Southern brought its suit and alleged that to tax it on the reduced

assessment was a violation of the Fourteenth Amendment. On the face of it that could not be confiscation or spoliation under the guise of taxation.

We conclude that none of the plaintiffs has made out any case of assessments being in such excess of true value of property as to constitute a violation of the Fourteenth Amendment, and that no grounds for the granting of injunction to restrain *ad valorem* taxes as being unconstitutional thereunder have been shown.

3. *There is no showing in these suits that the assessments are such as to constitute a burden on interstate commerce, in violation of the commerce clause.*

The contentions of the plaintiffs as to the invalidity of the assessments under the commerce clause of course depend entirely upon their allegations that the assessments are excessive. And, as we have already seen, there are no allegations or proofs in the cases sufficient to raise any question of unconstitutionality of assessments as being excessive under either State or Federal Constitutions.

We have shown further that there is no basis, in fact or in law, for a contention that the assessments and taxes levied thereon constitute a violation of the Fourteenth Amendment.

Even if the bills of complaint contained any of those allegations of intentional, deliberate, systematic overassessment, of fraud or plan or scheme to assess the plaintiffs' property at more than its true value or at a higher percentage thereof than other property in the State, which allegations are necessary to raise a constitutional question as

to validity of assessments, still upon the facts of these cases and under the well settled principles of law, the *ad valorem* taxes here in question are not a burden on interstate commerce, do not violate the commerce clause, and in fact are not excessive.

The report of the State Tax Commission to the Governor for transmission to the Legislature, in August 1920, in which that Commission handed to the Legislature for its approval or disapproval the results of its work under the Revaluation Act, and which is relied upon by the plaintiffs as evidence (Seaboard's Record, p. 76 *et seq.*, 82), set forth in general terms the basis upon which the valuations of railroad properties were made. It said:

> "Under the new Interstate Commerce Act the Interstate Commerce Commission is required to make rates that will yield an average return of not less than five and one-half per cent upon the railroad lines as a whole, and to find the fair value of these properties as the basis for making the new rates. That Commission has not yet determined the basis on which the value of the railroad lines will be finally fixed. It will take several years to complete the physical valuation of all of these properties. Pending this final valuation the railroad lines have submitted to the Interstate Commerce Commission what is known as their investment accounts and have asked that this basis of value be used for determining the scales of rates and amount of return they are entitled to earn on their properties. It seems clear to us that the time has come when the value upon which a railroad or public utility is permitted to earn a return is the value upon which it should pay taxes to this State. In either case the purpose is

> to find the fair value of the property. So that generally our valuation of the railroad lines in this State is based upon a mileage proportion of their investment account, which they have asked the Interstate Commerce Commission to adopt as the basis for making their rates, and to this mileage proportion we have added the value which we find to represent the intangible value of their North Carolina lines, based upon the volume of business in this State greater than the average volume of traffic on their lines as a whole."

This was the report upon which the Legislature acted when it approved the valuations and adopted them as assessments, giving them effect as such. From it we see that the basis of valuation was to take the investment account of the entire road and allocate a mileage proportion of that to North Carolina. This of course arrived only at a value for tangible properties and took into account no intangible value of properties in North Carolina.

To arrive at this, then, we see from the affidavit of the Tax Commission (Southern Record, p. 96 *et seq.*) that several factors were considered.

Apportioning the investment account to North Carolina in the proportion that gross earnings of the railroad in that State bore to its total gross earnings gave a much larger valuation than apportioning it on the mileage basis.

The difference between North Carolina's mileage proportion and its gross earnings proportion of the investment account gave at once a definite indication of the difference between the mere value of tangible property in the State and the value of tangible property plus the intangible values inhering in that property in North Carolina, this in-

tangible value growing out of the greater volume of traffic in North Carolina than the average of the system, the existence of more double track in that State than the average of the system, the greater gross earnings per mile in North Carolina than the average gross earnings per mile of the entire system, and other factors tending to give a greater intangible value to properties in North Carolina than the average intangible value for the entire system.

Therefore the mileage proportion of the investment account was taken as the basic figure for tangible property value in the State, and the gross earnings proportion of the investment account was taken as the basic figure for intangible values in the State plus the value of the tangible property, or for total of tangible and intangible property in the State.

That total, the gross earnings proportion of the investment account, was not, however, taken as the final valuation of total properties in the State, but, except in the case of the Norfolk Southern, it was revised and reduced to the advantage of the railroad by a consideration of the stocks and bonds value, of the amount arrived at by capitalization at 6 per cent of the net earnings per year in North Carolina for a period of years, and of other factors. And it was this reduced amount that was taken as being the final value of total properties in the State.

The plaintiffs contended then, and now contend, that the straight mileage proportion of their investment account would show a proper valuation for property in North Carolina. This manifestly would not do because it would leave out of account all intangible values.

They contend that to the extent to which capitalization

of net earnings in the State was used it was wrong to use 6 per cent as the percentage for such capitalization. That contention is fully answered by the decision of this court in the case of *Railroad v. Greene,* 244 U. S., 522. Six per cent is the legal rate of interest in North Carolina.

Let us now examine the assessments of the interstate railroads involved in these suits, adopted and approved by the Legislature in 1920 upon the basis of valuation made as above shown by the State Tax Commission, first in the light of authority and second in the light of the contentions made by the plaintiffs, that we may see that there is no basis for the allegations that those assessments and taxes levied thereon are a burden on commerce or a violation of the commerce clause.

Although a State may not tax property outside its jurisdiction belonging to persons domiciled elsewhere, it may tax the property of such persons located in its jurisdiction.

Fargo v. Hart, 193 U. S., 490, 499.

It is not and cannot be doubted that each State of the Union may tax all property, real and personal, within its borders, belonging to persons or corporations, although employed in interstate or foreign commerce, provided the rights and powers of the National Government are not interfered with.

Delaware Railway Tax Cases, 18 Wall., 206, 232.
Telegraph Co. v. Texes, 105 U. S., 460, 464.
Western Union v. Massachusetts, 125 U. S., 530.
Marye v. B. & O. Railroad, 127 U. S., 117, 123, 124.
Leloup v. Mobile, 127 U. S., 640, 649.

Pullman's Palace Car Co. v. Pennsylvania, 141 U. S., 18.

Cleveland, etc., R. Co. v. Backus, 154 U. S., 439, 445.

Western Union v. Taggert, 163 U. S., 1, 14.

Although a State may not directly burden interstate commerce by imposing taxes upon the occupation of engaging in it, or upon the receipts received therefrom, or upon the privilege of engaging therein, yet it may tax property belonging to corporations or other persons engaged in such commerce. Whatever the particular form of the exaction, if it is essentially only property taxation, it will not be considered as falling within the inhibition of the Constitution. The fact that it is devoted to interstate commerce does not interfere with State taxation.

Pullman Palace Car Co. v. Pennsylvania, 141 U. S., 18.

Pittsburgh, etc., Co. v. Backus, 154 U. S., 421.

Postal Telegraph v. Adams, 155 U. S., 695, 696.

Adams Express Co. v. Ohio, 165 U. S., 194.

Adams Express Co. v. Ohio, 166 U. S., 218.

There can be no contention made that the *ad valorem* taxes here involved are anything other than property taxes pure and simple. They are not imposed on receipts from commerce; they are in no way a tax upon the privilege of engaging in interstate commerce. Their payment is not made a condition precedent to the right to engage in such commerce. They are in essence and fact property taxes and the plaintiffs only contend that they conflict with the commerce clause in that they are based on excessive assessments.

In *Adams Express Co. v. Ohio,* 165 U. S., at 220, the Supreme Court said:

> "Although the transportation of the subjects of interstate commerce, or the receipts received therefrom, or the occupation or business of carrying it on, cannot be directly subjected to State taxation, yet property belonging to corporations or companies engaged in such commerce may be; and whatever the particular form of the exaction, if it is essentially only property taxation, it will not be considered as falling within the inhibition of the Constitution. Corporations and companies engaged in interstate commerce should bear their proper proportion of the burdens of the governments under whose protection they conduct their operations, and taxation on property, collectible by ordinary means, does not affect interstate commerce otherwise than incidentally, as all business is affected by the necessity of contributing to the support of the government. *Postal Telegraph-Cable Co. v. Adams,* 155 U. S., 688."

It is settled by very many decisions of this court that in the valuing of railway property for taxation, including property of interstate railroads, the taxing officers may take into consideration the parts of the railroad lying in other States and consider the value of the system as a whole, in order to arrive at the value of the part within the taxing State. This is known as the Unit Rule of assessing.

State Railroad Tax Cases, 92 U. S., 575;
Delaware Railroad Tax, 18 Wall., 206;
Erie R. Co. v. Pennsylvania, 21 Wall., 492;
Western Union v. Massachusetts, 125 U. S., 530;
Pullman Palace Car Co. v. Pennsylvania, 141 U. S., 18;

Charlotte, etc., R. Co. v. Gibbs, 142 U. S., 386;
Columbus, etc., R. Co. v. Wright, 151 U. S., 470;
Pittsburgh, etc., Co. v. Backus, 154 U. S., 421;
Cleveland, etc., R. Co. v. Backus, 154 U. S., 439;
Adams Express Co. v. Kentucky, 166 U. S., 171.

Accordingly, it is the well settled rule of this court that the taxing officers of a State may make an assessment or valuation of the property of an interstate railroad taxable within the State upon a mileage basis, even though the property so assessed is used as an instrumentality of interstate commerce. That is, after arriving at a valuation of the whole system under the Unit Rule, they may take as being the proportion of that total property which is within the one State that proportion which the mileage in that State bears to the total mileage.

Western Union Tel. Co. v. Massachusetts, 125 U. S., 530;
Pullman Palace Car Co. v. Pennsylvania, 141 U. S., 18;
Maine v. Grand Trunk R. Co., 142 U. S., 217;
Charlotte, etc., Co. v. Gibbs, 142 U. S., 386;
Pittsburgh, etc., R. Co. v. Backus, 151 U. S., 421;
Western Union Tel. Co. v. Missouri, 190 U. S., 412;
Fargo v. Hart, 193 U. S., 490;
Adams Express Co. v. Ohio, 165 U. S., 194.

In the case last cited the court said:

"As to railroad, telegraph and sleeping-car companies, engaged in interstate commerce, it has often been held by this court that their property, in the

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several States through which their lines or business extended, might be valued as a unit for the purposes of taxation, taking into consideration the uses to which it was put and all the elements making up aggregate value, and that a proportion of the whole fairly and properly ascertained might be taxed by the particular State, without violating any Federal restriction. (Citing many of the above cases.) * * * And it has been decided that a proper mode of ascertaining the assessable value of so much of the whole property as is situated in a particular State is, in the case of railroads, to take that part of the value of the entire road which is measured by the proportion of its length therein to the length of the whole. *Pittsburgh, etc., Railway v. Backus,* 154 U. S., 421. * * *

"The States through which the companies operate ought not to be compelled to content themselves with a valuation of separate pieces of property disconnected from the plant as an entirety, to the proportionate part of which they extend protection, and to the dividends of whose owners their citizens contribute."

As we have seen, the basis of the valuations upon which the assessments in question were made was a unit rule valuation of the tangible properties of the whole railroad, an apportionment of the result of a mileage proportion to North Carolina, and the adding of the value of intangible properties in that State arrived at by a consideration of the factors above enumerated.

A tax on an interstate railroad by the Unit Rule is a tax on property, not a privilege tax on the privilege of doing business.

Fargo v. Hart, 193 U. S., 490, 499, citing
Western Union v. Taggert, 163 U. S., 1, 21, 22.

In the case of *Fargo v. Hart, supra,* although the general applicability of the Unit Rule was declared, the particular tax involved was held invalid on the following peculiar and distinguishing facts: the subject of the tax was an express company, involving very much more attenuated relations than where there is a physical line of rail or wires; the company had no physical lines in the taxing State, Indiana; it had only $8,000 worth of property in the State; outside the State it had two millions of real property not used in the business at all, three millions of real property in all used in the business; one and one-half millions of personal property in New York not used in the business. Indiana undertook to tax the proportion of all this property that the mileage of the lines over which the express company operated in Indiana bore to all the mileage over which it operated everywhere, including ocean mileage. This one State assessed the company for twice the value of the total good-will of the company in all States. The courts, of course, held that this was not a mere case of overvaluation, but was unconstitutional in principle. Even in this strong case three judges dissented, holding that the Unit Rule was applicable.

We are here dealing, not with the attenuated relations of an express company, having no physical lines in the State, but with the organic relations of railway companies having very valuable portions of their lines and physical properties, essential connecting links in their entire systems, in the State of North Carolina.

It is perfectly competent for the State to assess all the properties of a railroad within the State as a unit, and then to allocate this assessment to the various counties through

which it runs, on a mileage basis, for *ad valorem* taxation by those counties.

Union Pacific R. Co. v. Christensen, 275 Fed., 6, 11.

That is the way in which railroads are subjected to property taxation in North Carolina.

We have seen that the assessments complained of in these suits include not only the valuation of the tangible properties of the railroads in North Carolina, but a valuation of the intangible values inhering in the use of those properties as part of an organic whole, in the more than average productiveness of the portion of the lines lying in North Carolina as shown by higher gross earnings per mile in that State, and in other factors.

Because the Machinery Act, in Section 64, uses the word "franchise" to describe this intangible property value, some effort is made in the bills of complaint to confuse this concept with the franchise tax, which is a privilege tax, not a property tax, a tax upon the privilege of doing intrastate commerce within the State. "Franchise tax," as used in Section 82 (6½) of the Revenue Act means the privilege tax, the validity of which we shall consider in Part II of this brief. As used in the Machinery Act, the word franchise is simply used to refer to intangible property.

Frequently, in tax statutes and in decisions of the courts, the word "franchise" is used to refer to intangible property values flowing from the franchise to be a railroad corporation. And a tax on that franchise—that is, on intangible property—is a property tax and clearly distinct from a franchise or privilege tax on the right or franchise *to do*.

The word franchise, as meaning intangible property, and

as distinct from the adjective qualifying a privilege tax, was defined in *State Railroad Tax Cases,* 92 U. S., 573, to be "The value of the right to use this tangible property in a special manner for the purposes of gain."

In *Columbus Southern Railway Company v. Wright,* 151 U. S., page 470, the court thus referred to the means of ascertaining the value of railroad property:

> "The value of the roadway at any given time is not the original cost, nor, *a fortiori,* its ultimate cost after years of expenditure in repairs and improvements. On the other hand, its value cannot be determined by ascertaining the market price of adjacent lands, and adding the value of the cross-ties, rails, and spikes. The value of land depends largely upon the use to which it can be put, and the character of the improvements upon it. The assessable value, for taxation, of a railroad track can only be determined by looking at the elements on which the financial condition of the company depends, its traffic, as evidenced by the rolling stock and gross earnings in connection with its capital stock."

It was those very elements of intangible value which were looked to in arriving at that portion of the assessments complained of in these suits.

The franchise of a corporation, although that franchise is the business of interstate commerce, is, as a part of its property, subject to State taxation, providing at least the franchise is not derived from the United States.

> *Atlantic Telegraph Co. v. Philadelphia,* 190 U. S., 160, cases cited at 163.

There are two separate kinds of corporate franchise, both of which are taxable by the State, the franchise to be, and

the franchise to do; the franchise to exist as a corporation, and the franchise to do business as a corporation.

Adams Express Co. v. Ohio, 166 U. S., at 244.

The franchise or privilege of being a corporation is deemed personal property, and is subject to separate taxation as property in addition to taxation on tangible property. The right of the States to tax it as property has been recognized by this court and by State courts in instances without number.

Horn Silver Mining Co. v. New York, 143 U. S., 305.

It is well settled that in so far as the property constituting the line of an interstate carrier in a State is regularly or habitually used or employed in that State, it is within the taxing power of that State, both the tangible and the intangible propery, although it is chiefly devoted or applied to interstate transportation.

Cudahy Packing Co. v. Minnesota, 246 U. S., 450;
Pullman Co. v. Pennsylvania, 141 U. S., 18;
Adams Express Co. v. Ohio, 165 U. S., 194;
Adams Express Co. v. Ohio, 166 U. S., 185;
American Ref. Co. v. Hall, 174 U. S., 70;
Union Ref. Co. v. Lynch, 177 U. S., 149.

As to the power to tax intangible properties within the State of an interstate carrier, this court said in *Adams Express Co. v. Ohio,* 166 U. S., 219:

> "It is as certainly property, and property of value, as if it were a building or a steamboat, and is as justly subject to taxation. It matters not in what this property consists—whether privileges, corporate fran-

chises, contracts, or obligations. It is enough that it is property which, though intangible, exists, which has value, produces income, and passes current in the markets of the world. To ignore this intangible property, or to hold that it is not subject to taxation at its accepted value, is to eliminate from the reach of the taxing power a large portion of the wealth of the country."

The immunity of an individual or corporation engaged in interstate commerce from State regulation does not prevent a State from imposing ordinary property taxes on property having a situs within its territory and employed in interstate commerce; and the franchise of a corporation, although that franchise be the business of interstate commerce, is, as a part of its property, subject to State taxation, provided it be not a franchise derived from the United States.

Atlantic and Pac. Tel. Co. v. Philadelphia, 190 U. S., 160, 163;

U. S. Glue Co. v. Oak Creek, 247 U. S., 321, 327;

Underwood Typewriter Co. v. Chamberlain, 254 U. S., 113.

In the *Underwood Typewriter Case, supra,* it was said (pp. 119-120):

"It is contended that the tax burdens interstate commerce and hence is void, under Section 8, Article I, of the Federal Constitution. Payment of the tax is not made a condition precedent to the right of the corporation to carry on business, including interstate business. Its enforcement is left to the ordinary means of collecting taxes. St. Louis, etc., Co. *v.* Arkansas, 235 U. S., 364; Atlantic and Pacific Tel. Co.

> *v.* Philadelphia, 190 U. S., 160, 163. The statute is, therefore, not open to the objection that it compels the company to pay for the privilege of engaging in interstate commerce. A tax is not obnoxious to the commerce clause merely because imposed upon property used in interstate commerce, even if it takes the form of a tax for the privilege of exercising its franchise within the State. Postal Tel. Cable Co. *v.* Adams, 155 U. S., 688, 695."

Under the laws of North Carolina this intangible property, this franchise in the sense of property, is taxed as property under the general *ad valorem* property tax which goes to the support of counties, cities, towns and other political subdivisions of the State. The franchise in the sense of the privilege of engaging in a particular sort of business, that is strictly intrastate commerce carried on wholly within the State, is taxed under the privilege tax whose validity is a separate matter, considered in part II of this brief, and the avails of which privilege tax go to the support of the State Government.

The principal contention of the plaintiffs as to the assessment of their intangible property as part of their total property assessment is that they have adduced evidence that they are not now earning such a percentage of return on their invested capital as would justify a finding that their intangible property has any value, or has such value as that at which it is assessed for taxation. And a large part of their effort to prove that their assessments are too high and therefore unconstitutional is their effort to prove that their assessments are not justified by their showing as to what their earnings are.

But the law is clear that the franchise of a railroad considered as part of its intangible property is not necessarily to be regarded as valueless merely because its present earnings are not sufficient to pay more than high grade investment, or even to pay the operating expenses.

State Railroad Tax Cases, 92 U. S., 575, 606.
Ohio Tax Cases, 232 U. S., 576, 590.

In the *State Railroad Tax Cases* the board of equalization had assessed the capital stock and franchise, the intangible property, of a railroad at $2,003,415, and its tangible property at $2,629,367. The company showed that it was at the time earning practically nothing above operating expenses and contended that since it was earning no net profit, there was no intangible property value. That contention was disposed of by Mr. Justice Miller in language which was specifically approved in the late *Ohio Tax Cases.* He said:

> "This sounds plausible, but it is nothing more. Concede for the present that the capital stock is sunk and is of no value; concede that the funded debt of the company has at present no market value, or is unsalable—there remains what is valued as worth over $2,600,000 of real and personal property, which, like all other property of individuals, ought to pay its proportion of the public burdens. There also remains the value of the franchise, which is not destroyed by the circumstance that the road does not pay interest on its debt. Does anybody believe that this debt is of no value—that the holders of it attach no value to this franchise? Are they willing to give up the right to operate the road, to receive freights

and fares, to endeavor to make it pay something more than the mere value of the personal property of the track, the depots, the grounds, the rolling stock, and other tangible property? Is it supposed by any one that they intend or will ever sell these separately or apart from the right to use them as a railroad? Why do not the bondholders, sell all these things under their mortgage at auction as a man would sell town lots and household furniture, and horses and carriages? The reason is too clear to escape observation. It is because in the case of the railroad there is attached to all this property, and goes with it, a privilege, a right to use it through the whole extent of the righest counties of Illinois, in transporting persons and property, in a manner which adds immensely to its value when considered as so much iron, so much land, and so much personal property. By virtue of this privilege or franchise, this is all aggregated into a unit, well adapted to make money, by its use in that way, with a chartered right to use it for that purpose.

"It is this *franchise* which the Legislature of Illinois intended to tax, which it had a right to tax; and in taxing it committed no injustice, if it was fairly assessed, though the corporation which holds it may be so *utterly bankrupt* that it must necessarily pass from it into other hands. In those hands, disembarrassed of its overweight of debt, who shall say that it is not worth $2,000,000, and who shall say that such is not the real value now of this franchise?"

The law as announced in those cases is sufficient answer to the contention of the plaintiffs that their assessments are unconstitutional because they cannot be checked by com-

parison with the market values of their stocks and bonds and with their earnings at the present or for the period of economic disturbance through which this country has been passing in recent years.

Some complaint is made by several of the plaintiffs that when they were notified of the total amounts of their assessments, upon which total *ad valorem* taxes are levied, they were not notified as to what proportion of that total amount represented valuation of tangible properties and what proportion intangible properties.

They contend that because the Machinery Act, in the often-quoted section 64, directs a separate valuation of tangible properties and intangible properties, therefore their assessments are illegal because they were not notified as to what that separation or division was.

A complete answer to that contention is that the assessments here complained of were not made under the provisions of the Machinery Act but under those of the Revaluation Act of 1919 which contained no direction whatever to make separate valuations of these component elements, but simply directed a valuation of the whole property of railroads.

Even, however, if these assessments had been made under the terms of the Machinery Act, nothing in that act directed that the taxpayer must be informed as to what part of the assessment represented tangible, and what part intangible property. There is no showing in these suits that any one of the plaintiffs made any demand before it brought its suit that it be notified of such apportionment to tangible and intangible properties, and there is no showing that any one of the plaintiffs ever made any report or gave any informa-

tion to any of the officers of the State to enable them to arrive at such an apportionment.

That the valuation of railroad property for taxation is made as a whole, instead of disintegrating it into its component parts and ascribing to each its fraction of value, does not affect the validity of the valuation.

Brooklyn, etc., R. Co. v. New York, 199 U. S., 52.
Western Union v. Taggert, 163 U. S., 1, 28.

In the last cited case it was said:

> "The bill further alleges that the State Board of Tax Commissioners did not attempt to specify or describe the plaintiff's real estate, machinery, and appliances subject to local taxation. But the statute did not require of them any such specification or description; nor does the plaintiff appear to have requested them, or to have done anything toward assisting them to do so."

And again all of these contentions by the plaintiffs as to failure to separate the total assessment into tangible and intangible values, and to notify them of such separation, address themselves to no question of constitutionality of the assessments but to the mere question of their *legality* under statutes of the State, and find their complete answer in the fact which we have been at pains to show that the Legislature of North Carolina by statutory enactment specifically approved these very valuations and made them assessments, the basis of taxation. After that act of the Legislature approving everything that was done in arriving at the valuations of which plaintiffs complain there can be no question of the *legality* of the resulting assessments.

Aside from what we have already considered the plaintiffs assert only three reasons why they contend the assessments should be deemed so excessive as to be a burden on interstate commerce, and unconstitutional as such: *first*, because of the system of accounting used in allocating expenses and revenues to North Carolina; *second*, because they have, as they contend, important terminals outside North Carolina larger than terminals in that State, and *third*, because the North Carolina assessments were not controlled by and reduced to the tentative figures of the Interstate Commerce Commission. We shall consider these three contentions of *seriatim*.

First, as to the question of the accounting system.

The allegations of the Southern on this point may be taken as typical. It alleges (Southern Record, 10-12) that its assessment was arrived at by taking its average net annual revenue in North Carolina for five years, capitalizing it at six per cent, and taking the result as the assessment. It alleges that under the method of accounting now employed by it (Southern Railway Company) operating expenses allocated to North Carolina are understated and operating revenues allocated to that State are overstated, because the allocation of operating expenses is made arbitrarily and not with mathematical accuracy. It contends therefore that the figures reported by it to the State Tax Commission, when that body was working on these valuations in 1919-1920 under the Revaluation Act, as being its average annual net income were much higher than they would have been if allocation under its accounting system had been mathematically accurate, and that, therefore, the Southern's assessment, which happens to equal the result

which would be produced by capitalizing at 6 per cent that annual net income, is not accurate, is excessive, and therefore a burden on interstate commerce.

The first answer to this contention is that the assessments were not arrived at by simply capitalizing at six per cent the net annual revenue.

As we have seen the Tax Commission, in doing its tentative work of valuation under the Revaluation Act, considered a great number of factors other than capitalization of net income. They took first a mileage proportion of the investment account. That gave a figure less than the final valuation. They took a gross earnings proportion of the investment account. That gave a figure considerably higher than the final valuation. Then they considered the factors and modes of capitalization of net income, the market values of stocks and bonds, the amount of double track and the volume of traffic in North Carolina greater than the average of the system, and revised these investment account figures by a consideration of all those modes and factors, reducing them from a higher figure to the valuation finally arrived at.

In the case of the Southern and one or two ther plaintiffs, that investment account figure was reduced to the exact amount which might have been originally arrived at by capitalization of net income. Certainly, however, the plaintiff cannot complain of the use of a factor which reduced its assessed value from what would without that factor have been a higher amount.

But as to the merits of the accounting system itself upon the basis of which was determined the net annual income, and which was therefore used in so far as the factor of capitalization of net income was considered at all, what sort of case have the plaintiffs made before a court of equity?

This figure of net annual income, in so far as used at all, was in each case taken from the railroad's own reports to the Tax Commission, based upon the railroad's own system of accounting, and its own data kept in accordance with that system.

The system of accounting of which they complain is in each case the railroad's own system, invented by the railroad, and the best system that the railroad has thus far been able to devise. *This is admitted.* Again the system used is not only the plaintiff's own system in each case, but is the only system in existence. If the plaintiff didn't have the correct or the best system of accounting and allocation between States, how can it complain that the State adopted the railroad's own system?

The lack of equity in this contention of the plaintiffs is shown in strong light when we see that their own officers swear, as the only excuse for not having a more accurate system of accounting, that it could not be done without great expense. (J. B. Duke's affidavit, Southern Record, p. 80, middle.)

It appears, therefore, that the system of accounting used by the railroads, and used by the State of North Carolina in so far as the capitalization of income plan was followed in arriving at these assessments, is the best system available. What the best system is is a matter of opinion which, like opinions as to property value, is beyond the power of a court to review. All systems and methods partake of the imperfections of human nature and assessments for taxation cannot be checked by any hard and fast rule.

Second, as to the question of more expensive terminals outside North Carolina.

This contention, like the one we have just discussed, bears only on the question of allocation of operating expenses and revenues to North Carolina and to the ascertainment, under the plaintiffs' own system of accounting, of net annual income in North Carolina. It bears therefore only on the question of whether the plaintiff's system of accounting allocates sufficient expenses to North Carolina. This again is a matter of the railroads' own concern. If it would cost them too much to invent a more accurate system of accounting, they can not complain that North Carolina has not done it for them before trying to levy a property tax.

In addition, the defendants in these suits allege that large terminals outside of North Carolina are more than counterbalanced by the great number of smaller but important terminals and shipping points in North Carolina; that North Carolina is a richer State than its contiguous neighbors, a State of many comparatively small but prosperous towns rather than a State of one or two important large cities such as Virginia or Georgia or Tennessee. They contend that a very large proportion of the most productive traffic over the plaintiff railroads initiates or terminates at points within North Carolina, resulting in the charging to North Carolina of all the operating expenses of that traffic, while only a very small proportion of the operating revenues of that traffic are allocated to North Carolina on account of the short mileage in that State as compared with the total long trans-State shipment. They contend that this, their own accounting system, of which the plaintiffs are here complaining, in the long run evens up and gives to each State the most accurate allocation of net operating revenues which these very capable railroads have been able to devise.

The defendants contend, in addition, that terminal expenses outside of North Carolina are still further outbalanced by the much more rugged nature of the country through which the railroads run in North Carolina. It costs more to build railroads in North Carolina than in Virginia, South Carolina, and Georgia. North Carolina is not, as this court said of North Dakota in the case of *Wallace v. Hines,* 253 U. S., at page 69, " a State of plains," but is, as this court judicially knows, a State containing the most rugged terrain east of the Rocky Mountains. Railroad systems and properties are more valuable in a State like North Carolina than in a State like North Dakota.

The defendants further contend that North Carolina is a much richer and more prosperous State than the average of the States through which the interstate plaintiffs run, that it pays more taxes to the Federal Government, that it has more prosperous agriculture and manufactures, and that property values are relatively higher in that State than in others traversed by the plaintiffs.

The Southern in particular refers to the fact that its lines through North Carolina form a narrow funnel through which great volumes of trans-State shipping are poured from one end of its system to the other. The defendants in answer call attention to the great volumes of traffic originating in North Carolina throughout the great manufacturing belt of the Piedmont country, tobacco from Winston-Salem, granite from Mount Airy, furniture from High Point known as the Grand Rapids of the South, and cotton manufactures from all over the Piedmont section of the State. The defendants contend that the very "funnel" or "intestinal" character of the plaintiffs' lines through North Carolina shows the rela-

tive value of that portion of their lines in the whole system. The *antennæ*, the extremities of the system, might be cut off and incapacitated and the railroad still function, but if the heart of the system, located in North Carolina, were incapacitated the usefulness of the system would be destroyed.

All these considerations, however, bear only upon questions of opinion and judgment as to facts. The facts as to values are within the scope of power of taxing authorities, but they are not facts upon which courts exercise their judgment. These considerations all bear on the question whether as matter of fact the assessments are correct, and as we have seen that question cannot be a constitutional question.

Third, as to the tentative figures of the Interstate Commerce Commission.

The plaintiffs contend that their assessments are burdens on interstate commerce because not controlled by and reduced to what are known as the tentative figures of the Interstate Commerce Commission. This we think is the weakest of all the contentions put forward by the plaintiffs in these suits.

The Interstate Commerce Commission directed its engineers to make a physical valuation of railroads to be used by that commission for rate making purposes. This physical valuation it will take years to complete. It is far from complete now. In the meantime the engineers have made certain speculative estimates which they call tentative figures. It is these which plaintiffs contend should have been taken as the value of their properties for taxation.

These tentative figures are, in the first place, *tentative*. In the second place, they represent only physical property—no intangible value. In the third place, they are based on price

levels of 1914. In the fourth place, they are based on inventory of property as made in 1916. In the fifth place, the final figures of the Commerce Commission's engineers may be entirely different from these tentative figures. They afford no basis whatever upon which a court of equity could hold the North Carolina assessments to be a burden on interstate commerce or a violation of any constitutional provision.

As to those tentative figures the defendants in their answer say (Southern Record, pp. 43-44):

> "6. Answering the allegations of article six of the complaint as to the so-called tentative figures of the Interstate Commerce Commission, defendants say that these figures are purely tentative and in no way final or binding. They are figures arrived at by engineers of that Commission from an estimation of the value of property of the plaintiff and other railroads based on an inventory as of June 30, 1916, and on prices prevailing June 30, 1914. The price level in general and particularly the cost of railroad construction have very greatly increased since 1914. As an illustration of this, reference is made to the report of the plaintiff to its stockholders for the year ending December 31, 1919, being its 25th annual report, and to page five thereof, wherein the plaintiff reports that the work of laying a double track on a revised grade of plaintiff's line between Washington and Atlanta had been finished; that as originally contracted and estimated this work was to cost $34,838,000, but that the actual cost of it was $52,134,000, or about fifty per cent greater. This latter sum represents the actual cost of construction of six hundred and twenty-five miles of second track, the cost of laying which is less than that of laying first track, and shows that the said second track between Wash-

ington and Atlanta cost $82,884.00 a mile on an average. The year 1914, upon the price level of which the said tentative figures of the Interstate Commerce Commission are based, was actually a subnormal period as to prices with relation both to time before and time after the said year. Therefore, the said tentative figures in no way represent the actual cost of replacement of the tangible property of the plaintiff as of the dates 1920 and 1921.

In addition, these tentative figures do not include the intangible property of the plaintiff consisting of the franchise to be a corporation, the franchise to do business as a corporation, the going concern value, the good-will and other intangible property subject to taxation in North Carolina."

And the members of the former State Tax Commission in their affidavit (Southern Record, p. 100) state:

"And affiants state of their own knowledge that the said prices prevailing in 1914 as to material, labor and all costs of railroad construction, were abnormally low, that since that time such prices have greatly increased, and that in 1919 and in 1920 the said prices of labor, materials, and all things going into the construction of railroads were very much higher than those of 1914 upon which the said tentative figures of the Interstate Commerce Commission were based. In the opinion of the affiants the said tentative figures in no way furnish a proper index or test of the value of the properties of railroads in North Carolina in 1919 and 1920."

But why, in any case, should the opinion of the engineers of the Interstate Commerce Commission as to the fact of

value have any more binding force with the courts than the opinion of the State Tax Commission approved by the Legislature of North Carolina, when the courts cannot concern themselves with the question of the correctness of taxation assessments but only with fraud, intentional and deliberate overassessment, or clear employment of a fundamentally unconstitutional principle of assessment?

Affirmatively, we show that these assessments were based upon the tentative work of the State Tax Commission—a body of expert tax assessors, who sought all the evidence they could get—and was enacted as law by the Legislature after due consideration. There is more than a presumption of the correctness of these assessments. They can only be attacked for fraud or fundamentally wrong principle.

Finally, the action of the plaintiffs and of the Interstate Commerce Commission with reference to rates is conclusive that the assessments are not excessive. The case of the Southern will illustrate all. The defendants charged in the answers (Southern Record, p. 45) that while that plaintiff was contending in North Carolina that its property in that State was worth only around 60 millions for taxation, it was at the same time contending before the Interstate Commerce Commission that its properties for purposes of allowance of rates were of such value as, allocated to North Carolina on the gross-earnings basis, would give a value for the property of that plaintiff in this State of 111 millions of dollars.

The only answer which the plaintiffs attempted to make to this at the hearing in the District Court was, that no such allocation was actually made. We do not say it was made. We make it for ourselves. What we say is, that the total property value submitted to the Interstate Commerce Com-

mission in Docket ex parte, 74, was such a figure as that, upon allocation thereof to North Carolina on the gross-earnings basis, the Southern would have 111 millions of property in this State. This is not denied. It is only denied that the division and allocation was made. The rate increase was granted to all railroads in the southeastern group of railroads. But it was based on the book accounts of those roads which give, in the case of the Southern, allocated as aforesaid, 111 millions to North Carolina.

So we see that the plaintiffs have shown no excessiveness in their assessments as matter of fact and that they have established no case of burden on interstate commerce under the law.

Their whole argument under this head comes down to a contention of fact that their assessments are higher than the actual value of their property and a contention of law that the fact that their assessments are excessive necessarily results in importing into North Carolina from abroad taxable values or the taxing of property beyond the jurisdiction, and amounts to a burden on interstate commerce.

And we refer, in answer to this contention, again to the language of this court in the case of *Western Union v. Taggert,* 163 U. S., 1, 36, which language was quoted and approved in *Adams Express Co. v. Ohio,* 165 U. S., at 229:

> "The allegation that 'the attempted and pretended valuation of complainant's said property by said State Board of Tax Commissioners, in manner aforesaid,' 'necessarily includes, and does in fact include, values which are not a part of the true cash value of the property of complainant in Indiana,' is but equivalent to an assertion that the decision of the tax

commissioners upon the question of fact committed by the statute to their determination was erroneous. As said by this court in *Pittsburgh, etc., v. Backus*, above cited, 'Whenever a question of fact is thus submitted to the determination of a special tribunal, its decision creates something more than a mere presumption of fact; and if such determination comes into inquiry before the courts, it cannot be overthrown by evidence going only to show that the fact was otherwise than as found and determined.'"

We contend, therefore, that the plaintiffs have failed to show that the assessments complained of, in their amount, violate either State or Federal Constitutions and that they have not shown any equity to support their prayer for injunction to restrain collection of *ad valorem* taxes on the ground of excessiveness of the assessments upon which such taxes are levied, or the method by which such assessments were made.

VII.

The plaintiffs have made out no case of unconstitutionality of assessments for discrimination under either State or Federal Constitution.

1. *The contentions of the plaintiffs as to discrimination.*

It will be remembered that in 1921 each of the plaintiffs petitioned the newly created office of Commissioner of Revenue to reduce its quadrennial assessment, made under the Revaluation Act and approved by the Legislature of 1920, and that after granting a hearing to each of them, at which they introduced evidence and made arguments and filed

briefs, and after full consideration of each case, the Commissioner decided that none of the plaintiffs except the Norfolk Southern had shown that its assessment was higher than the value of its property in 1921 and except in that one case refused to make any reduction.

In the case of the Norfolk Southern he did decide that the assessment approved by the Legislature and adopted for four years, to-wit, $27,023,462,, was in excess of the true value of properties in North Carolina and he reduced it to $22,840,932. The Norfolk Southern makes no point of discrimination as to *ad valorem* taxes but rests its prayer for injunction as to those taxes purely on allegations that even as reduced its assessment was and is excessive. Under the principles we have already discussed it has failed, with all the other plaintiffs, to make out any case for equitable relief against the *ad valorem* taxes. In parts I and IX of this brief we shall consider our affirmative proposition that the Norfolk Southern is fixed with consent to its assessment. As to discrimination in *ad valorem* taxation we need consider only the other four plaintiffs.

We have seen that by the revaluation of all property in North Carolina made in 1919-1920 under the Revaluation Act real property in general was raised to about four times the 1919 assessment and railroad property was not quite doubled.

On page 78 of the Seaboard Record will be found a compiled table showing the increase of the revaluation assessment over the 1919 assessment, in totals, as to various classes of property and taxpayers which shows clearly that, far from railroads being subjected to any unusual or extraordinary or relatively burdensome increase, their assessment was raised less than that of any other class of taxpayer.

Quotation of a few of the items from that table will show strikingly what is the basis in fact upon which the plaintiffs' contentions as to discrimination must rest. Railroad properties were raised from $125,417,618 to $250,587,158, an increase of $125,169,540, or less than doubled. Real property in general in the State was raised from $506,808,394 to $2,006,124,997, an increase of $1,499,316,603, or nearly quadrupled. Personal property was practically doubled. Cotton mills were raised from $58,266,591 to $205,581,304, an increase of $147,314,713, or nearly quadrupled. Woodworking and furniture factories were raised from $8,053,188 to $24,728,628, or more than tripled. Power companies were raised from $8,331,112 to $56,484,094, or increased nearly seven times.

As we have seen a depression in 1920-1921 followed the revaluation, affecting particularly the values of farm products and the values of real property in general as influenced immediately thereby. In many cases land was found to be assessed at much more than its possible sale value. Farmers were suffering great losses. At the same time railroads were granted by the Interstate Commerce Commission a 25 per cent increase of freight rates and a 20 per cent increase of passenger rates.

As a result of the widespread depression of real estate values and the belief throughout the State that much real property was assessed above market value under the revaluation, the Machinery Act of 1921 authorized county boards to convene to determine whether real estate in general in the individual counties was assessed at more than value and if so to reduce, by an average percentage reduc-

tion, the assessments for the county. Another provision of the law authorized correction of individual cases, upon petition of the property owner, so that each taxpayer's property might be assessed at true value.

In the same statute, Section 28 (*g*), to which we have already referred, taxpayers whose property was not locally valued but centrally valued by the State Tax Commission (replaced in 1921 by Commissioner of Revenue) were authorized to petition the Commissioner of Revenue for a reduction of their revaluation assessment.

In 67 of the counties of the State the county boards made an average percentage reduction of real property in the State. In the other 33 counties no reduction was made. Some of the counties through which the plaintiffs' lines run were counties in which reductions were made, some were not. The Commissioner of Revenue, upon their petition and after full hearing, decided that the plaintiffs' railroad property assessments should not be reduced.

The contention of the plaintiffs as to discrimination, as set forth specifically in their complaints, is this: In 67 counties of the State, some of them counties through which their lines run, county boards reduced real property in general by an average percentage reduction; this was done by reason of depression which reduced property values in the State in 1921 below what they were in 1920; the Commissioner of Revenue refused to reduce their assessments; their property was worth less in 1921 than in 1920; this refusal to reduce their assessments, when 67 counties reduced locally assessed real estate assessments, constitutes discrimination, and renders their assessments as they stand for 1921 unconstitutional, as being in conflict with the uniformity

clause of the State Constitution and the equal protection clause of the Fourteenth Amendment.

Upon the hearing in the District Courts the plaintiffs endeavored to argue an entirely different contention of discrimination, not only that the refusal of the Commissioner of Revenue to reduce their assessments in the proportion that real property was reduced in certain counties constituted discrimination, but that even if the railroad property was assessed at actual value both in 1920 and 1921 still other real property in the State was assessed on an average at less than actual value and had been for years, and that this was proved by certain tables of sales prices gleaned from deeds compared with tax assessment values.

Not one of the plaintiffs put any such allegation of discrimination as that latter contention in its bill of complaint. The only allegation of discrimination in any complaint is directed against the Commissioner of Revenue and charges him with discriminating in refusing to reduce railroad assessments. In no complaint is it alleged that local assessors have discriminated against railroads by assessing real property in general at less than its value or at a less percentage of its value than that at which railroads are centrally assessed.

It would seem to us to be a sufficient answer to any attempt of the plaintiffs to make the latter argument that there is no allegation in the bill to support such a contention and that the only question of discrimination in these suits arises from the action of the Commissioner of Revenue in refusing to reduce the assessments of four of the plaintiffs in 1921.

2. *There are no allegations in the complaints sufficient to raise any constitutional question of discrimination.*

There is no allegation in either complaint of any intention to discriminate, either on the part of the Commissioner of Revenue or on the part of local assessors or local boards of review.

There is no allegation of fraud.

There is no allegation of any deliberate or systematic or persistent discrimination or of any scheme or agreement between taxing or assessing officials or boards.

There is no allegation or intimation anywhere in the complaints that the action of the Commissioner of Revenue in refusing to reduce the assessments of the plaintiffs was anything other than a perfectly honest and *bona fide* exercise of his discretion.

Taking the allegations most strongly for the plaintiffs they amount to nothing more than a charge that the decision of the Commissioner of Revenue not to reduce plaintiffs' assessment was an erroneous exercise of his official discretion and was contrary to the weight of the evidence submitted to him.

The law is perfectly clear that such allegations are not sufficient to raise any constitutional question of discrimination or to serve as the basis for a prayer for injunction to restrain the collection of taxes.

It is well settled that mere errors of judgment by officials will not support a claim of discrimination. There must be something more—something which in effect amounts to an intentional violation of the essential principle of practical uniformity. The good faith of such officers and the validity

of their actions are presumed; when assailed the burden of proof is upon the complaining party.

Head Money Cases, 112 U. S. 580, 595;
Pittsburgh, etc., Ry. Co. v. Backus, 154 U. S. 421, 435;
Maish v. Arizona, 164 U. S. 599, 611;
Adams Express Co. v. Ohio, 165 U. S. 194, 229;
New York State v. Barker, 179 U. S. 279, 284, 285;
Coulter v. Louisville, etc., R. Co., 196 U. S. 599, 608;
Chicago, etc., R. Co. v. Babcock, 204 U. S. 585, 597;
Sunday Lake Iron Co. v. Wakefield, 247 U. S. 350, 353.

To set aside, as discriminatory, assessments for taxation, therefore, it must appear that the discrimination in favor of another class or other classes of property, as against the party complaining, was intentional, systematic, and persistent, and was the result of a scheme or agreement among taxing officers to apply a different principle of valuation. Differences in opinion or judgment leading to discriminatory valuations are not reviewable in the courts. The intentional, systematic, and persistent scheme must appear from pleadings and proofs.

Chicago, etc., R. Co. v. Babcock, 204 U. S. 585;
Coulter v. Louisville, etc., R. Co., 196 U. S. 599;
Louisville, etc., R. Co. v. Coulter, 131 Fed. 282;
Union Pac. R. Co. v. Christensen, 275 Fed. 6, 9.

In the *Chicago R. Co Case, supra,* the court said:

> "It is said that this valuation is absurd and due to misunderstanding of the table (a table of market values of stocks and bonds). But we have nothing

to do with complaints of that nature, or with anything less than fraud, or a clear adoption of a fundamentally wrong principle. * * *

"A point less pressed than the foregoing was that the other property in the State was greatly undervalued, and that thus the rule of uniformity prescribed by the Constitution of Nebraska had been violated. Upon this matter it is enough to say that no scheme or agreement on the part of the county assessors, who taxed the other property, was shown, or on the part of the Board of Equalization and Assessment, and to refer to *Coulter v. Louisville & Nashville R. Co.*, 196 U. S. 599."

This language of the court was used in a case in which the allegations were exceedingly strong. The railroads alleged that the board, induced by political clamor and fear, had arbitrarily fixed excessive assessments and had included property beyond the jurisdiction of the State, thus depriving them of their property without due process of law. The plaintiffs further specifically charged political duress and that the excessive valuations were the result of a consequent scheme of fraud.

The opinion by Mr. Justice Holmes in the case of *Coulter v. Louisville & Nashville R. Co., supra,* is a full discussion of these principles, and particularly of their application to all such evidence of discriminatory valuations as is sought to be adduced in the present cases. The bills were dismissed because the plaintiffs had failed to prove a fraudulent scheme, and a great mass of evidence of undervaluation of property other than railroad property, settled habit recognized by the Legislature, rapid increase in railroad assessments and slow increase for other real estate, tabulated statements of

sales in different counties, and cross-examination of members of the boards to show confusion of their minds, were all discredited by the court and held not to show a fraudulent scheme. This case is conclusive on the questions of discrimination and of evidence thereof.

It is only where there is allegation and proof of an intentional, deliberate, systematic, and persistent discrimination in the principle upon which the tax is assessed, as where railroad property is intentionally, deliberately, systematically, and persistently assessed at a higher percentage of its estimated value than is other property, that the enforcement of property taxes may be restrained as discriminatory.

Sunday Lake Iron Co. v. Wakefield, 247 U. S., 350.
Greene v. Louisville, etc., R. Co., 244 U. S., 499.

But a complaint that the plaintiffs' property was assessed at 100 per cent by an assessing board, while real estate in general was assessed at only one-third its value, presents no violation of the Fourteenth Amendment and no ground for judicial relief where a deliberate purpose of the assessing board so to discriminate is not clearly established, and where the discrimination may, therefore, be attributed to an honest mistake of judgment and lack of time and evidence for making general valuation.

Sunday Lake Iron Co. v. Wakefield, 247 U. S., 350.

In these cases the plaintiffs have not only failed to introduce any evidence of fraud, deliberate or intentional discrimination, or agreement or scheme on the part of taxing officials or boards, but they have not even made in their complaints those allegations which are absolutely necessary

to give them any standing in a court of equity to complain of taxation assessments as discriminatory.

3. *In Fact and in Law There has Been no Discrimination Against the Plaintiffs as to ad Valorem Assessments.*

Absolute uniformity in taxation is an unattainable ideal, and in all systems of taxation there are inequalities and hardships which human administration cannot avoid and which cannot be relieved against by the courts.

State Railroad Tax Cases, 92 U. S., at 612.
Kentucky Railroad Tax Cases, 115 U. S., 337.
Adams Express Co. v. Ohio, 165 U. S., 194.
Adams Express Co. v. Ohio, 166 U. S., 185.
Billings v. United States, 232 U. S., 261.

In *State Railroad Tax Cases, supra,* it was said:

> "Perfect equality and perfect uniformity of taxation is a dream unrealized. It may be admitted that the system which most nearly attains this is the best. But the most complete system which can be devised must, when we consider the immense variety of subjects which it necessarily embraces, be imperfect. And when we come to its application to the property of all the citizens, in all the localities of a large State like Illinois, the application being made by men whose judgments and opinions must vary as they are affected by all the circumstances brought to bear upon each individual, the result must inevitably partake largely of the imperfections of human nature, and of the evidence on which human judgment is founded." Citing, *inter alia, Tappan v. Merchants Bank,* 19 Wall., 504.

The Federal Constitution imposes no restraints on the States in regard to unequal taxation.

Davidson v. New Orleans, 96 U. S., 97, 105.

There is no general supervision on the part of the Nation over State taxation, and in respect to the latter the State has, speaking generally, the freedom of a sovereign, both as to objects and methods.

Michigan Central Railroad v. Powers, 201 U. S., 245, 292.

There can be no question, after the frequent and uniform decisions of this court, that it was not designed by the Fourteenth Amendment to the Constitution to prevent a State from changing its system of taxation in all proper and reasonable ways, nor to compel the States to adopt an iron-clad rule of equality, to prevent the classification of property for purposes of taxation, or the imposition of different rates upon different classes. It is enough that there is no discrimination in favor of one as against another of the same class, and that the method for the assessment and collection of the tax is not inconsistent with the natural justice.

Michigan Central Railroad Co. v. Powers, 201 U. S., 245, 293, and many cases there cited.

Where the State Constitution, as in North Carolina, requires that taxes shall be levied by uniform rule, the mode of assessing railroad companies must be uniform, that is, one company of the same class and character cannot be assessed in one method and another company of precisely the same kind and character in a materially different method.

But corporations of different character may be assessed in different methods. The uniformity rule only means that all of a class shall be treated alike.

State Railroad Tax Cases, 92 U. S., 575.

The wording of the uniformity clause in the North Carolina Constitution is very significant. It does not require that taxes shall be uniform or equal. It merely requires that they shall be levied "by uniform rule." This is nothing but a requirement that the same principle or rule of assessment or levy shall be applied to all members of a given class. It is not a requirement that the resulting taxes shall be uniform or equal even within the class, much less between different classes.

The Legislature of North Carolina possesses the power to classify occupations and other subjects of taxation by statutory enactment. Classification in tax statutes will not contravene the rule of uniformity when the tax is imposed alike upon all of a class.

Albertson v. Wallace, 81 N. C., 479.
State v. Cohen, 84 N. C., 771.
State v. Powell, 100 N. C., 525.
State v. French, 109 N. C., 722.
Cobb v. Commissioners, 122 N. C., 307.
State v. Green, 126 N. C., 1032.
State v. Carter, 129 N. C., 560.
State v. Hunt, 129 N. C., 686.
State v. Robertson, 136 N. C., 587.

The foregoing rule of the North Carolina courts was specifically approved by this court in the case of *Armour Packing Co. v. Lacy*, 200 U. S., 226.

The classification together of railroads, express companies, and telegraph companies as subject to the unit rule in assessment does not deny the equal protection of the laws.

Adams Express Co. v. Ohio, 165 U. S., 228.

The Legislature of a State may, in its discretion, provide different methods for assessing corporations of different classes, and a statute cannot be successfully assailed upon the ground that it prescribes a method of assessing railroad corporations different from that prescribed for assessing other corporations.

Kentucky Railroad Tax Cases, 92 U. S., 663;
Missouri v. Lewis, 101 U. S., 22;
Cummings v. Merchants, etc., Bank, 101 U. S., 160;
Cincinnati, etc., Co. v. Kentucky, 115 U. S., 321;
Missouri Pacific R. Co. v. Mackey, 127 U. S., 205;
Minneapolis, etc., R. Co. v. Beckwith, 129 U. S., 26;
Home Ins. Co. v. New York, 134 U. S., 594;
Bell Gap R. Co. v. Pennsylvania, 134 U. S., 232;
Pacific Express Co. v. Seibert, 142 U. S., 339;
Magoun v. Illinois Bank, 170 U. S., 283;

A valuable discussion of the application of the Federal constitutional principle of equal protection of the laws and of the State constitutional rules of uniformity, and of the wide powers of the Legislatures to make classifications, is to be found in the opinion of Mr. Justice McKenna in the *Magoun Case,* last cited. He says:

> "The appellant attacks both its (the law's) principles and its provisions—its principles as necessarily arbitrary and its provisions as causing discriminations and creating inequality in the burdens of taxation.

"Is the act open to this criticism? The clause of the Fourteenth Amendment especially invoked is that which prohibits a State denying to any citizen the equal protection of the laws. What satisfies this equality has not been and probably never can be precisely defined. Generally it has been said that 'it only requires the same means and methods to be applied impartially to all the constituents of a class so that the law shall operate equally and uniformly upon all persons in similar circumstances.' *Kentucky Railroad Tax Cases,* 115 U. S., 321, 337. It does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed. *Hayes v. Missouri,* 120 U. S., 68. Similar citations could be multiplied. * * * With these for illustrations, it may be safely said that the rule prescribes no rigid equality and permits to the discretion and wisdom of the State, a wide latitude as far as interference by this court is concerned. Nor with the impolicy of the law has it concern.

"In other words, the State may distinguish, select, and classify objects of legislation, and necessarily this power must have a wide range of discretion."

The only limitation on this power of the State Legislature to classify, under both State uniformity rules and the Fourteenth Amendment, is that there must not be such clear and hostile discriminations against particular persons or classes of such unusual character and so unknown to the practice of governments, as that the classification cannot be said to be

based upon any reasonable ground, but must be held to be purely arbitrary.

Bell's Gap Railroad v. Pennsylvania, 134 U. S., 232, 237;

Gulf, etc., Railroad v. Ellis, 165 U. S., 150, 165;

Magoun v. Illinois Bank, 170 U. S., 283, 294;

Keeney v. New York, 222 U. S., 525.

But where there is a difference, it need not be great or conspicuous in order to warrant classification.

Keeney v. New York, supra, 536;

Republic Acceptance Corporation v. De Land, 275 Fed., at 637.

Classification of subjects of privilege or license tax by amount of property or business is competent and does not violate the Federal Constitution.

Magoun v. Illinois Bank, supra;

Clark v. Titusville, 184 U. S., 329.

Indeed, classification is essential to the principle of equality and uniformity in the burden of taxation. A uniform tax, without classification among subjects in different circumstances, would be grossly unequal and destructive of the principle of uniformity and equality in taxation and of a just adaption of property to its burdens.

Pacific Express Co. v. Seibert, 142 U. S., 339.

However, an arbitrary discrimination in taxation between domestic and foreign corporations is not a legitimate classification.

Southern Railway v. Greene, 216 U. S., 400.

But a discrimination between corporations and individuals with regard to taxation cannot be pronounced arbitrary, although the court may not know the precise ground of policy that led the State to insert the distinction in the law. The State may have a policy in taxation, and the courts may not review that policy.

Quong Wing v. Kirkendall, 223 U. S., 59, 63;
Ft. Smith Lumber Co. v. Arkansas, 251 U. S., 532.

There is no pretense in these suits that there has been any discrimination against foreign in favor of domestic corporations, or against interstate in favor of intrastate carriers. All are treated absolutely alike under the tax laws of North Carolina. And we see among the plaintiffs domestic corporations and foreign, interstate carriers and carriers operating only within the State, all making the very same contentions and attacking the tax laws of North Carolina in the same ways.

This immediately removes from these suits the most frequent ground for contention of violation of the Fourteenth Amendment, the ground upon which the decision in *Southern Railway v. Greene,* 216 U. S., 400, was based.

All members of the class of railroads are treated alike. All railroads are classed as one class and taxed in the same way.

It is perfectly competent for the State to class railroads together and tax them in a different way from other taxpayers. It is perfectly competent for their properties to be assessed by central boards, while the property of private landowners is assessed by local county boards. There can be no doubt that under the rules of classification it was perfectly competent for the statute of North Carolina to repose

the discretion of reviewing and passing upon the question of reduction of assessments in county boards as to real property in general and the Commissioner of Revenue as to railroads and all other public service corporations centrally assessed.

The fact that railroad property is assessed by one board or body; that other property in the State is assessed by other and independent bodies, and that there is no general equalization of the property of railroads with other property, does not render such assessment or the taxes levied thereon invalid.

> *Cummings v. National Bank,* 101 U. S., 153;
> *Michigan Central Railroad v. Powers,* 201 U. S., 245, 301.

In the *Michigan Central Case* the court quoted with approval and applied to the case of a railroad tax the following language of the court in the *Cummings Case*:

> "While it may be true that this system of submitting the different kinds of property subject to taxation to different boards of assessors and equalizers, with no common superior to secure uniformity of the whole, may give opportunity for maladministration of the law and violation of the principle of uniformity of taxation and equality of burden, that is not the necessary result of these laws, or of any one of them; and a law cannot be held unconstitutional because, while its just interpretation is consistent with the Constitution, it is unfaithfully administered by those who are charged with its execution."

We see, therefore, that no complaint can be made that as to real property in general it was the local boards which had

the discretion to decide whether reductions should be made, and as to railroad property it was the Commissioner of Revenue. It follows necessarily, from this very separation of functions and discretions that in all human probability there will be some inequality of result, even under the system prevailing in North Carolina where the Commissioner of Revenue is one of the three members of the State Board of Equalization whose duty it is to equalize the assessments of all property in the State.

The central board or officer cannot be intimately and personally acquainted with the values of real property in a county. The county boards cannot be intimately acquainted with the values of railroads as a whole or unit throughout the State. Elements of fact or evidence may influence the local boards which would not influence the central officer. It is inherent in the nature of things that where such a discretion is reposed in two different boards or persons there is apt to be some difference in its exercise.

But it is competent under the law for such discretion to be so reposed in different bodies or persons and any unintentional lack of uniformity which results is not illegal or unconstitutional but simply unavoidable. It is a result of the limitations of humanity which prevent the ideal of perfect equality or uniformity in taxation from being possible of achievement.

And so it is clear that in order to raise any constitutional question of discrimination it would be necessary for the plaintiffs not only to allege but to prove that there was some privity or agreement, some plan or scheme, between the Commissioner of Revenue and the various county boards, whereby the former should refuse to reduce railroad assess-

ments and the latter should reduce assessments of other property in order to discriminate against railroads and in favor of others.

Even if such allegation had been made, it is quite obvious from the evidence that no such scheme or plan or agreement existed. If it had, thirty-three counties out of the hundred in the State would not have refused to reduce locally assessed property. The very fact that only 67 county boards made a reduction and that 33 made none shows that there was no scheme, plan, or agreement among the county boards. There is not a scintilla of evidence that the Commissioner of Revenue acted in privity with any one of the county boards which did make reductions.

The plaintiffs make no such contention. They merely contend that the same elements in economic conditions which caused depression in 1921 in land values in general applied *equally* to railroad property values, and that therefore it was a mistake for the Commissioner of Revenue not to give them the benefit of the average reduction in the 67 counties where reductions were made.

An immediate answer to this is that the values of permanent system properties of railroads, devoted to a technical use, depend on very different elements from those upon which the values of land in general depend. When farmers and other landowners were suffering absolute losses in North Carolina in 1921, the Interstate Commerce Commission granted to railroads raises of 25 per cent as to freight rates and 20 per cent as to passenger rates. There was no governmental board which could in this way raise the price the farmer should get for his tobacco or cotton, or the profit the merchant or manufacturer should realize on his business.

From its very nature railroad property does not fluctuate violently in value following temporary depressions as does real property. The plaintiffs are entirely wrong as to their first proposition: That the conditions causing depression of real property in general also and equally depressed the value of railroad property.

Besides there was no general reduction of real property assessment throughout the State. The whole matter was controlled by purely local conditions. In some counties the great majority of the real property was farm land, cotton or tobacco land, and the ruinous prices obtained for those crops violently depressed land values in those counties. Such counties made reductions in assessments to correspond to local conditions.

In other counties a greater proportion of lands were devoted to industrial, commercial, and similar pursuits, and the farm land was not exclusively devoted to the one or two crops which failed but to a variety of purposes. In such counties the local conditions were not such as to depress land values perceptibly enough to justify a finding that they were below the assessed value. Thirty-three such counties refused to make reductions, because not justified by local conditions.

But railroad properties are wisely valued and assessed as units, a unit for the system, a unit for the taxing State. It would be unwise to attempt to value the lines of the Southern in North Carolina by allowing each county to value that part in its boundaries. It is not local conditions so much as State-wide and nation-wide conditions which affect the values of railroad properties.

It is an absolute non-sequitur for the plaintiffs to con-

tend that because real property assessments in general were reduced in 67 counties out of 100, therefore it was discrimination not to reduce railroad property assessments as a whole throughout the State.

Take counties like Guilford, Forsyth, or others of the larger, richer counties of the State which pay most taxes to the State and in which no reduction of assessments of any property was made in 1921. Then suppose that, following the contention of the plaintiffs, the Commissioner of Revenue by analogy to the reductions made in 67 counties had reduced all railroad property in the State by the average percentage of such reductions. The citizens of Guilford, Forsyth, or any of the other thirty-one counties in which no reduction had been made, would have had every cause to contend that such conduct on the part of the Commissioner of Revenue was a discrimination against them, since their land continued to be taxed at the 1920 assessment and the properties of railroads in their counties were reduced in assessment.

If the contentions of the plaintiffs were valid a citizen of Guilford County under the existing State of facts would have the same right to sue in the Federal courts to restrain the collection of all *ad valorem* taxes on the ground that the fact that real property in 67 counties was reduced from the 1920 assessment and he was taxed for 1921 on the same assessment as the year before was an unconstitutional discrimination against him.

The want of equity in these contentions is more strikingly shown when we consider that all real property, as such, owned by railroads in North Carolina, that is all real property *off the right of way* and not devoted to purposes of

transportation (and of such property the plaintiffs own a considerable amount in various counties) is assessed locally like all other property and, wherever it lay in one of the counties which made reductions in 1921, *was reduced in assessed value exactly as all other real property in that county.* So that as to all property in the same condition and situation as other real property the plaintiffs did get the very same benefit of reductions as all other persons in every one of the 67 counties making reductions in which they had such property.

It was only the railroad system property, centrally assessed and centrally passed upon for determination of the question of reduction, which was not reduced in assessment.

As to the reductions, the question is essentially only one of classification. The entire class of personal property, comprising a very considerable portion of taxable values, was left in 1921 without any reduction from 1920. As to this class the Legislature did not even authorize reduction. Except in one instance, there was no material reduction made in the class of railroad property. Even in the class of real property in general, there was no systematic or uniform reduction. There were only sporadic reductions in various counties, according to local conditions. This is perfectly competent classification, and all rules against discrimination are always subject to the power of the State to make reasonable classifications. Discriminations are such only when made between members of the same class.

That the contentions of the plaintiffs as to discrimination utterly fail to take into account differences between local conditions and State-wide conditions, and have no basis in law, is seen from the argument made by the Atlantic Coast

Line that it was discriminated against because the valuation of its right of way does not change at the corporate limit of the town of Rocky Mount, while as to real property in general assessments inside the limit are higher than those without. This is merely a roundabout attack on the Unit Rule of assessment of railroad property, which rule is so well settled as the correct method as to be beyond dispute. It is in effect merely a contention that the property of that railroad in the same State should be locally assessed in chunks, like farms or city lots.

Upon the hearing, however, when the plaintiffs had utterly failed to make out any case for equitable relief on their allegation that the Commissioner of Revenue had discriminated against them by refusing to reduce their assessments in 1921 the only allegation in their complaints as to discrimination, and when the only evidence they introduced had no reference whatever to any possible discrimination on the part of the Commissioner of Revenue, the plaintiffs endeavored to change their attack and to argue, without any allegation in their complaints to support it, that the discrimination against them consisted not in the act of the Commissioner of Revenue in refusing to reduce their assessments, but in a general practice of local boards throughout the State of underassessing other property.

The plaintiffs certainly had no confidence in this idea when they brought these suits or they would have made such allgation in their complaints. At the hearing they failed to introduce a scintilla of evidence to show that the Commissioner of Revenue had been guilty of discrimination within the meaning of any of the principles of law we have discussed. The only evidence they had was a tabulated list

purporting to be a list of sales of real estate during a period of months, compared with tax assessments, and purporting to show that sales of real estate in general had for that period been made at higher prices than the assessed values of the lands.

This evidence manifestly had no bearing on their allegation that the Commissioner of Revenue had discriminated against them by refusing to reduce their assessments, for there was no pretense that when he passed upon their applications the Commissioner had any knowledge of the alleged facts contained in these lists, or that anybody else had any knowledge of such facts.

And what is the basis for such a contention by the plaintiffs?

Nothing but these lists of sales compared with assessment values, evidence such as that of which this court said in the case of *Coulter v. Louisville & Nashville R. Co.*, 196 U. S. at 609:

> "It is not contended that a mere undervaluation would be enough. It is admitted that it must have been systematic and intentional. There is, no doubt, a natural inclination to think such an undervaluation probable when it is suggested. But what is the proof? * * * It is obvious that the accidental sales in a given year may be a misleading guide to average values, apart from the testimony that some at least of the conveyances did not report true prices, yet they furnish the chief weapon of attack. * * * Inequality, we repeat, is nothing, unless it was in pursuance of a scheme."

It is such "accidental sales in a given year" which constitute the sole evidence upon which the plaintiffs rely to support their contention of discrimination.

The lists of these sales themselves show that in many instances the true sale price is not given. They state that the price named on the recorded deed was taken if it appeared to be the real consideration. Otherwise the sale price was estimated from the amount of Federal Revenue Stamps.

The court will take judicial notice of the fact that revenue stamps are placed on deeds in 50-cent denominations upon every $500 of the sale price or fraction thereof. If the sale price was $4,001 the stamps would be $4.50 and the person compiling the list, reading the amount of stamps, would put down the sale price as $4,500. This would allow an error of $499 in a sale of $4,001. This one fact is sufficient to crush all probative value of these lists.

Again there are no corresponding lists of sale prices of railroads compared with assessed value of railroads. This is impossible because railroads have not been bought and sold on the market like farms. Yet such a table is the only thing to which the evidence offered would bear any analogy.

The whole result of this evidence, however, even if it had any probative force, would be to come down to the bare proposition that the mere fact that some property may be assessed relatively lower than the property of the plaintiffs constitutes discrimination in law. This is not the law.

There is no discrimination against railroads in fact. Their property is taxed in 1921 on an assessment scarcely twice that existing before the statewide revaluation, while the property of other classes of corporations, tobacco companies, power companies, manufacturing companies and the

like, are taxed upon assessments all the way from three times to seven times higher than pre-revaluation assessments. And real property in general is taxed upon assessments nearly four times higher than those of 1919.

If there were any inequality, however, there is not a scintilla of evidence that it is the result of intentional discrimination, or of any plan, scheme, agreement, fraud, or systematic purpose. There is not only no proof of this but it is not even alleged.

VIII.

The plaintiffs' contention that the general system of taxation created by the North Carolina statutes is a violation of the Constitution of the State is without merit.

Some of the plaintiffs make a particular contention under the State Constitution which has no reference to constitutionality under the Federal Constitution but is purely a question of State law upon which the Supreme Court of the State has not yet passed.

They contend that the effect of the State Constitution is to require the Legislature to impose an *ad valorem* tax on all property and to devote the avails of this tax to both State and local purposes.

They argue, therefore, that it was a violation of the State Constitution for the Legislature in 1919 and 1920 to "abolish the *ad valorem* tax for State purposes," as it is loosely described, that is to cease to devote a certain percentage of the *ad valorem* tax to the support of the State Government, to provide that all avails of the *ad valorem* tax should go to the support of the local subdivisions of the State and to raise

all revenues for the support of the State government by the various income, inheritance, franchise, license, privilege, and excise taxes imposed by the Revenue Act.

No doubt where a substantial federal question is presented, a question of constitutionality under the Federal Constitution which gives the District Court sitting with three judges jurisdiction under Section 266 of the Judicial Code, local questions as well as the questions arising under the Federal Constitution are properly before the court.

Louisville & Nashville R. Co. v. Garrett, 231 U. S. at 304;

Wofford Oil Co. v. Smith, 263 Fed. 396.

But the reference to "constitutionality" in Section 266 is to an asserted conflict with the Federal Constitution; the question of unconstitutionality in that sense must be substantial and is the basis of the jurisdiction of the court.

Ibid.

But although it has jurisdiction to consider the questions of State law and of constitutionality under State constitutions, a substantial federal constitutional question being presented, still if the federal constitutional grounds upon which the plaintiff comes into the court fail, the federal court will be very cautious about retaining jurisdiction to pass upon questions of State law and interfering with the State's administration of its taxes upon other considerations which would not have given it jurisdiction.

Coulter v. Louisville & Nashville R. Co., 196 U. S. 599, 609.

In that case this court said:

> "But the supposed infringement of the Fourteenth Amendment is the only ground on which the railroad company could come into the Circuit Court, and if that ground fails, and obviously fails, the court should be very cautious, at least, in interfering with the State's administration of its taxes upon other considerations which would not have given it jurisdiction."

If this Court should reverse the District Courts and hold that the taxing system of North Carolina violates the Federal Constitution, it would serve no purpose for it to go farther and pass upon the question of constitutionality under the State Constitution which has not been passed upon by the State Courts. If this Court should affirm the District Courts in their refusal to grant injunctions on the ground of violation of the Federal Constitution, then under the rule, it should be very cautious about going farther and passing upon this pure question of State law.

The construction by the State courts of last resort of the State Constitution and statutes will be accepted as controlling by the Federal Courts.

Adams Express Co. v. Ohio, 165 U. S. at 219.

To what purpose then should this court be asked to pass upon the question whether the State Constitution requires avails of property taxation to be distributed by the Legislature both to State and local purposes, when if this Court decided that question the Supreme Court of North Carolina might the next day announce a contrary decision which would be controlling?

But there is no merit in the contention of violation of the State Constitution.

The constitutional provision is this:

Article V, Sec. 3:

> "Laws shall be passed taxing, by a uniform rule, all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise; and, also all real and personal property, according to its true value in money: (Proviso) * * * The general assembly may also tax trades, professions, franchises, and incomes: Provided, that no income shall be taxed when the property from which the income is derived is taxed."

This provision is merely a direction that the Legislature shall impose an *ad valorem* tax on all property. It cannot possibly be construed into a direction that the avails of such tax must be apportioned both to the support of the State and of the local governments. It nowhere says that avails of the *ad valorem* tax must be applied to the support of State Government. It merely directs that the tax shall be imposed.

There is no denial that the tax is imposed. It is merely complained that its avails all go to local purposes.

The constitutional provision itself specifically authorizes the Legislature to tax trades, professions, franchises, and incomes, to impose the very taxes which are imposed by the Revenue Act and the avails of which go to support the State Government.

To ask a court to hold that that constitutional provision forbids the Legislature to devote the avails of the *ad valorem* tax to local purposes and the avails of the trades, professions,

franchise, and income taxes to State purposes, is simply to ask the court to read into the Constitution of North Carolina words which the people have not put into it.

A somewhat similar contention, made as an allegation only, we believe, in the complaint of the Norfolk Southern is that it is a violation of this provision of the Constitution of North Carolina to levy any *ad valorem* tax at all against railroad property, since under the laws of the State shares of stock in the hands of shareholders of corporations are not taxed.

The contention is that the constitution requires all property to be taxed; that it is a violation of the constitution to tax any property unless all is taxed; that although the capital stock of corporations is taxed under North Carolina laws, the tax being collected at the source and paid by the corporation itself, still the shares of stock in the hands of shareholders are separate property from the capital stock and are therefore required by the Constitution to be taxed also; that the fact that only the capital stock is taxed, not the shares in the hands of shareholders, is a violation of the Constitution which renders any *ad valorem* property tax against the plaintiff railroad invalid.

Of course this same contention might be made by every landowner in North Carolina with equal force.

There is, however, no merit in the contention. "Investments in stocks" are taxed in North Carolina, in compliance with the direction of Article V, Section 3, by the taxing of the capital stock.

Prior to 1887 domestic corporations in North Carolina were required to list and pay taxes on all their real, personal, and tangible property upon valuations fixed by local assessors

at the situs of the corporation. The corporation itself was not required to list and pay taxes on its capital stock. The shareholder was required to list his shares of stock at his place of residence and to pay the taxes thereon as there assessed.

Under this method all the stock owned by non-residents escaped taxation, as well as a large part of that owned by residents of the State, while all that was listed was undervalued.

In 1887 the law was changed and the present method of taxation of investments in stock was adopted. Under the new method, whereby the corporation itself is required to list and pay taxes directly and at source on its capital stock, corporate stock cannot escape taxation.

This law has been on the statute books nearly a third of a century without change. It is set out in the Machinery Act of 1921, sections 42 and 43 (Appendix E to this brief).

The officers of corporations are required to file with the Tax Commission (now Commissioner of Revenue) a report showing total capital stock, number of shares issued, par value of each share, dividends declared and highest price of stock. The tax officers thereupon fix the tax value of each share and the corporation is required to pay the tax assessed against the share for the owner. This clearly meets the requirement of the Constitution and constitutes a taxing of "investments in stocks" of the corporation.

There is nothing in the Constitution requiring the Legislature to tax both capital stock and shares of that capital stock as distinct investments. When the capital stock is taxed, the investment in stock is taxed, and it is immaterial whether the tax is paid by the corporation for the share-

holder or by the shareholder for himself. The result financially is the same whether the capital stock is taxed as such or as shares in the hands of stockholders. And the method used in North Carolina is the most efficient and productive method for the collection of the tax.

Some courts draw a distinction between capital stock and the shares in the hands of the shareholders. If there is any distinction, however, it is that capital stock is a liability of the corporation and shares are assets in the hands of the shareholders. To contend that both should be taxed would be to contend that the corporation should be taxed on a liability. A liability cannot be taxed as an "investment." It is only property or investment which is required to be taxed and this requirement is met by taxing the capital stock as the investment or property of the shareholder, and the fact that the machinery of collection is payment direct by the corporation for the shareholder does not make it a tax on the liability of the corporation.

The Legislature is the judge of what constitutes double taxation and has the exclusive power to fix the taxing policy of the State. The policy of the Legislature of North Carolina is that to tax the capital stock and to levy an additional tax on shares in stockholders' hands would be double taxation. Whether the Legislature might have the power to impose such double taxation is immaterial. It has chosen not to do so and follows the example of all other States and taxes the capital stock and requires the corporation to pay it for the stockholders.

Certainly no other taxpayer can complain of his *ad valorem* tax on the ground that the Legislature has not imposed a double tax on corporate stock.

IX.

The Norfolk Southern is fixed with acquiescence in the assessment of its property and cannot be heard to complain of it in equity.

The property of the Norfolk Southern in North Carolina had been revalued by the State Tax Commission at $27,023,-462 and that value was approved and adopted by the Legislature as the tax assessment of that railroad.

In 1921, after the Machinery Act of that year in section 28 (*g*) as amended had provided that petitions might be filed with the Commissioner of Revenue to review the revaluation assessment and had given him the power to pass on such petitions and to reduce such assessment if facts shown him justified a reduction, the Norfolk Southern made an application under that statute to the Commissioner of Revenue to review its said revaluation assessment and to reduce it.

It filed with him a written petition setting forth facts and arguments which it contended showed that its assessment should be reduced. Its allegation was that the assessment of $27,034,168, being North Carolina's mileage proportion of the total properties of the Norfolk Southern valued at $30,-806,675, was excessive "when tested by any method known for the valuation of property." This petition will be found on pages 82 *et sequitur* of Norfolk Southern Record.

The petition does not purport to inform the Commissioner of Revenue what the Norfolk Southern believes the true value of its property in North Carolina to be. It attempts to prove that $27,034,168 is an excessive value by testing it by various

methods stated by the petitioner to be "methods of ascertaining the value of railroad properties."

The petition endeavors to show the excessiveness of the assessment, first, by comparing it with figures purporting to be the market values of the stocks and bonds of the Norfolk Southern; second, by comparing it with a sum contended to represent the capitalization of that company's net earnings, and third, by comparing it with the cost of reproduction less depreciation of its property in North Carolina as shown by the final valuations of the Interstate Commerce Commission.

With reference to the third comparison, the cost of reproduction less depreciation value, the Norfolk Southern in the said petition said:

> "7th. Another method of ascertaining the value of railroad property is the cost of reproduction of such property, less depreciation. Under the provisions of the Interstate Commerce Act relative to the valuation of railroad property by the Interstate Commerce Commission, agents of the Bureau of Valuation examined the property of Norfolk Southern Railroad Company, including its said leased lines; made a report of the cost of reproducing said lines of railroad, both new and with depreciation as authorized by the rules of the Commission, which included all of its non-carrier lands and buildings. A copy of the report was duly served upon the State of North Carolina. The State of North Carolina made no exception, apparently accepted the findings of the Bureau of Valuation as the cost of reproducing said property, and the cost of reproducing the same less depreciation. The Bureau of Valuation report showed the cost of reproducing the property of Norfolk Southern Railroad Company, including its leased lines, without depreciation, as $27,-

680,811.00, and after deducting depreciation, $23,412,336.00. Since the date of said valuation petitioner has made additions and betterments to its road bed and rolling stock according to the rules of the Interstate Commerce Commission to the value of $2,516,336.00. After being depreciated according to the rules of the Commission, the cost of reproduction less depreciation is $26,028,366.00.

"8th. It is quite evident from a consideration of these facts and figures, that the Tax Commission in making its valuation of 1920, failed and neglected to take into consideration the depreciation upon property which had been reported by the Interstate Commerce Commission, *and which by the laws of North Carolina are required to be taken into consideration in fixing the value thereof.*"

The petition then summarizes in the form of tables the facts alleged as to stocks and bonds value, capitalization of net earnings value, and cost of replacement less depreciation value of its property, the table as to cost of replacement less depreciation value being as follows:

"Taking either of said sums and allotting to the State of North Carolina a mileage proportion, the taxable value of the property in North Carolina would be:

"(*a*) * * *

"(*b*) Upon the valuation which the Act of Congress allows the company to earn 6 per cent cost of reproduction less depreciation:

North Carolina.....	87.754%	$22,840,932.30
Virginia	12.246%	3,187,433.70
Total.....		$26,028,366.00

And the petition closes with this prayer:

> "Your petitioner, therefore, respectfully shows in conclusion, that its property in North Carolina has been excessively valued for taxation and the Commissioner is respectfully requested to reduce this valuation to such figures as may be just and proper *and as shown by the foregoing facts.*"

It will be recalled that the method referred to by the Revaluation Act and directed to be used in the valuation of railroad properties was this very method of ascertaining cost of replacement less depreciation. That act, under which the valuation here complained of was made, provided the commission should have the right to require report by the company of—

> "cost of reproduction of the properties of such company new, including side tracks, double tracks, and all properties owned by such companies in this State, less reasonable depreciation for such of its properties as have depreciated in value, and shall also include the present value of all real estate used as rights of way, including depot sites, yards, terminals and otherwise.

As the result of the showing made by the Norfolk Southern in its petition, it being the only case in which the Commissioner of Revenue was furnished the *final figures* of the Interstate Commerce Commission as to cost of reproduction, all the other roads having submitted merely the incomplete tentative estimates, the Commissioner decided that $27,023,462 was an excessive assessment for the property of Norfolk Southern in North Carolina in 1921, and accordingly he reduced it to *the very figures submitted by that com-*

pany as being the cost of reproduction less depreciation of its property in North Carolina, the very value directed by the statute to be considered, to-wit, $22,840,932.30.

Nowhere in the petition did the Norfolk Southern contend or pretend that that sum was not the true value of its properties in North Carolina. On the contrary, it specifically asserted as matter of fact that it was the cost of reproduction less depreciation value, and that because that was true its revaluation assessment should be reduced.

The Norfolk Southern took no exception to the action of the Commissioner in reducing its assessment to this exact value pointed out in its petition and there contended to be the cost of reproduction less depreciation value of its property in North Carolina. It did not ask the Commissioner to reconsider and reduce to a lower figure. It made no protest. It acquiesced in his action in reducing the revaluation assessment to that sum. (Norfolk Southern Record, pp. 37-38.)

No protest, exception, or objection of any kind was made by the Norfolk Southern to this reduced assessment until it filed its bill of complaint on October 17, 1921, nearly a month after the Southern and A. & Y. had brought their suit on September 22, 1921, and the A. C. L. had brought its suit on September 26, 1921. It seems plain, therefore, that it never occurred to the Norfolk Southern to feel aggrieved or to complain of its reduced assessment until it saw other railroads bring their suits attacking the entire tax system of North Carolina, and decided that it desired to join in the attack in the hope that it might get a still further reduction than that already given it with its consent.

This is not a mere case of laches, therefore, or of acquies-

cence presumed from lapse of time, but of specific and express consent of this plaintiff to the assessment which it now complains of in this suit. Certainly it has no standing in a court of equity to ask that *ad valorem* taxes be enjoined on the ground of invalidity of an assessment made with its consent and upon its own showing of fact.

Its own figures having been accepted by the Commissioner, the corporation cannot complain that it was taxed disproportionately as compared with other railroads or other taxpayers, the Commissioner not having acted fraudulently.

St. Louis-San Francisco Ry. Co. v. Middlekamp, 256 U. S., 226, citing

Sunday Lake Iron Co. v. Wakefield, 247 U. S., 350, 353.

One other matter is worthy of note in connection with this reduction of the Norfolk Southern's assessment to the final cost of replacement less depreciation figure of the Interstate Commerce Commission. Some of the other roads contended in the district courts that it was a discrimination against them for the assessment of the Norfolk Southern to be controlled by, and reduced to, this Interstate Commerce Commission valuation, when their assessments were not controlled by the Interstate Commerce Commission valuations of their properties.

The Norfolk Southern was the only one of the plaintiffs as to whose properties the I. C. C. had completed its survey and announced a final cost of replacement less depreciation value. It is a comparatively small road and the engineers of the I. C. C. had been able to complete its physical valuation and to announce *final figures* on June 11, 1921 (Nor-

folk Southern Record, p. 8). The State Tax Commission, in revaluing this road in 1919-1920, and the legislature, when it approved and adopted the revaluation, were without the benefit of these final figures of the I. C. C.

But these figures were available in 1921 in time for the Norfolk Southern to submit them to the Commissioner of Revenue in its petition to him to reduce the revaluation assessment. It was entirely proper for him to consider these figures, of which neither the State Tax Commission nor the Legislature had had the benefit and in his discretion to reduce the revaluation assessment accordingly.

But no final figures have even yet been announced by the I. C. C. as to the properties of either of the other plaintiffs. The only thing they could show from the I. C. C. was the "tentative figures," not based on a complete physical examination and valuation, but on engineers' estimates. There is no analogy between these tentative figures and the final figures announced in the case of the Norfolk Southern to support any contention of discrimination by the other roads.

X.

Summary of contentions of defendants as to the ad valorem assessments and taxes.

We contend, therefore, that neither of the plaintiffs has shown that its assessment is illegal as being in violation of statutory method or in conflict with either the State Constitution or the commerce clause or the Fourteenth Amendment of the Federal Constitution, or has shown that its assessment is discriminatory in violation of either the uniformity rule of the State Constitution or the Fourteenth Amend-

ment; that neither plaintiff has made out a case of illegality or unconstitutionality of its assessment or has shown any equity to support its prayer for injunction to restrain collection of *ad valorem* taxes. We contend, therefore, that the district courts rightly refused to grant the interlocutory injunctions as to *ad valorem* taxes and that their decree should be affirmed.

PART II.

THE FRANCHISE OR PRIVILEGE TAX.

I.

The contentions of the parties and the question raised in these suits as to the franchise or privilege tax.

The discussion of the franchise or privilege tax will not be complicated with matters of fact. As to this tax there are no disputed facts and it is a pure question of law as to whether the tax is valid.

In addition to the *ad valorem* property tax which is imposed on railroads as well as on all property in the State and the avails of which go to support political subdivisions of the State, North Carolina imposes, as one of the numerous license, excise, franchise, privilege, and occupations taxes provided for by the Revenue Act and the avails of which go to support the State government, a "franchise or privilege tax" on railroads payable directly to the State Treasurer.

The statute takes "the value of the property, tangible and intangible, of each such railroad company in the State assessed for the year * * * for *ad valorem* taxes," as the basis upon which the calculation of the franchise or privi-

lege tax shall be made and as being the measure of "the extent to which every such railroad company is exercising its franchise in this State." The tax amounts to one-tenth of one per cent of that value, that is one-tenth of one per cent of the assessed value of the railroad's property in the State.

The plaintiffs contend, first, that this tax is illegally calculated in that it is based upon an excessive, illegal and unconstitutional assessment for *ad valorem* taxes. This is of course not a contention of invalidity of the franchise or privilege tax *per se,* but is merely the contention already discussed in Part I as to invalidity of the *ad valorem* assessment. If the plaintiffs have not shown invalidity of the assessments, then that contention has no pertinency here. If they have shown such invalidity, it does not follow that the franchise or privilege tax of one-tenth of one per cent of the assessments is invalid. This tax will be measured by one-tenth of one per cent of whatever is found to be the legal *ad valorem* assessment.

The plaintiffs contend that the franchise or privilege tax as to each of them is unconstitutional and invalid for three reasons, to-wit:

First, that it is a property tax, not a franchise or privilege tax, and hence is in violation of a supposed prohibition against double taxation in the uniformity clause of the State Constitution and in the Fourteenth Amendment.

Second, that if it is a privilege or franchise tax it is for the privilege of engaging in interstate commerce and therefore a burden on such commerce in conflict with the commerce clause of the Federal Constitution.

Third, that the respective franchise taxes levied have been illegally calculated in violation of the terms of the statute.

The defendants contend that this tax is not a property tax but a privilege tax; that it is not imposed upon the privilege of engaging in interstate commerce and is no burden on that commerce, but that it is imposed on the privilege of engaging in strictly intrastate commerce carried on wholly within North Carolina, is correctly and legally calculated in each case and is valid. They contend that even if it were a property tax, as alleged, it would not follow that it is invalid.

II.

History of franchise or privilege taxation of railroads in North Carolina.

Prior to 1920, in the Revenue Acts, the State took for its own purposes a percentage of the general *ad valorem* property tax, leaving the balance to the subdivisions. Railroads like other persons contributed to State support through the *ad valorem* tax. (Appendix A, Sec. 3.)

In addition, for over twenty years and until 1920, Schedule C of the Revenue Acts had levied a variety of privilege, license, and occupation taxes which went to State purposes. The tax on railroads under this Schedule was a privilege tax graduated on the gross earnings per mile within the State, in the form in which it appears in Sections 77 and 78 of the Revenue Act of 1919. In the introductory section of the Schedule, Section 76, it was called "a tax for the privilege of carrying on the business or doing the act

named." In Section 78 it was called "The annual license tax for operating railroads within the State." (Appendix A.)

Special privilege taxes were levied upon other special classes of corporations, and then in Section 82 two classes of "franchise or privilege" taxes were levied upon general corporations, the first class for domestic corporations, the second for foreign corporations in general. Section 82 (9) excluded from the operation of these general franchise or privilege taxes railroads and the other corporations upon which special privilege taxes were imposed by other sections of the Schedule.

In the first chapter of Public Laws of 1920 the *ad valorem* tax on property, including railroads, for State purposes was abolished, except as to a percentage for the school fund. (Appendix C, Sec. 2.)

To provide additional revenue for the State, in lieu of the portion of the *ad valorem* tax thus relinquished, the rate of privilege tax on domestic and foreign corporations in general was raised from 1/25 to 1/10 of one per cent of their capital stock, various changes were made as to other special classes of corporate privilege taxes, and Sections 77 and 78 in which had appeared for many years the provisions for privilege tax on railroads on gross earnings per mile in the State were repealed; section 82 (9) of Revenue Act of 1919 was amended by striking out "railroad" so that railroads should no longer be excluded from the operation of all the sub-sections of Section 82; and a new privilege or franchise tax on railroads was enacted and inserted in Section 82 as sub-section (6½).

This new sub-section substituted for the old privilege tax on gross earnings per mile the new form of franchise or

privilege tax measured by 1/10 of one per cent of the total *ad valorem* assessment of the property of the railroad within the State, in the form in which it now appears in the Act of 1921. (Appendix C.)

In the Revenue Act of 1921, Section 3, the *ad valorem* tax for State purposes was entirely abolished, and it was provided that no tax on any property in the State should be levied for any of the uses of the State government and that taxes levied thereinafter were to raise the revenues for all State purposes. Schedule C of that act brought forward the changes that had been effected by the Act of 1920. The privilege tax on chair and sleeping cars was put in the place of the old Section 77 and Section 78 was marked obsolete. The franchise or privilege tax on railroads stood as Section 82 (6½). (Appendix D.)

III.

Power of the State to impose franchise or privilege taxes on interstate railroads.

1. *General Power of the State to Impose Franchise, Privilege, License, or Excise Taxes.*

There is a well recognized class of taxes within the power of the States to impose on railroads and other corporations, similar in their nature to the occupation and license taxes imposed on individuals for the exercise of certain privileges, and entirely distinct from property taxation. These taxes, both in statutes and in decisions, are indiscriminately denominated franchise taxes, privilege taxes, license taxes, and excise taxes for the privilege of doing certain business.

In Part I of this brief we have already called attention to the distinction between the frequent and untechnical use of the word "franchise" as meaning nothing more than the intangible property value springing from the use of the related tangible properties as an organic whole, and the true technical use of that term as designating a privilege. This distinction was pointed out in the case of *Adams Express Co. v. Ohio,* 165 U. S. at 244, and other cases cited in Part I of this brief.

And, although the taxation of franchises in the sense of property is limited by the rules governing property taxation, the imposition of a tax on a franchise in the true sense of privilege is a power somewhat arbitrary in its nature and allowing the very widest discretion to the Legislature, which may fix it at a percentage of a valuation or may impose it arbitrarily without any valuation.

California v. Pacific Railroad Co., 127 U. S. 1, 41, wherein the Court said, after citing *Railroad Co. v. Peniston,* 18 Wall., 5:

> "As explained in the opinion of the court in the latter case, the tax there was upon the property of the company, and not upon its franchises and operations. * * * The taxation of a corporate franchise merely as such, unless pursuant to a stipulation in the original charter of the company, is the exercise of an authority somewhat arbitrary in its character. It has no limitation but the discretion of the taxing power. The value of the franchise is not measured like that of property, but may be ten thousand or ten hundred thousand dollars, as the Legislature may choose. Or, without any valuation of the franchise at all, the tax may be arbitrarily laid."

There is the further well recognized distinction between a license tax authorized only in support of a police supervision, and a license tax for revenue. In the former case it is limited by the expense of the police regulation. In the latter case it is a true privilege tax for revenue and is arbitrary in its nature.

Atlantic, etc., Telegraph Co. v. Philadelphia, 190 U. S. at 164.

The franchise or privilege tax involved in these suits is a tax for revenue, not a license in support of a police regulation. Its purpose is to provide one of the sources of the revenue for the support of the State government.

Since a tax upon a privilege is an entirely different thing from a tax upon property, it is settled that a privilege, franchise (in the true sense), license, or excise tax may be imposed for or upon the privilege entirely in addition to all property taxation, and that such imposition will not constitute double taxation and will not violate the Federal Constitution.

Brooklyn City R. Co. v. New York, 199 U. S., 8, 50.
Ohio Tax Cases, 232, U. S., 576.
St. Louis, etc., R. Co. v. Arkansas, 235 U. S., 350.
Republic Acceptance Corp. v. De Land, 275 Fed., at 639, and other cases cited therein.

In the *Ohio Tax Cases, supra,* cases involving railroad taxation, the court said on this point:

> "Fifthly, it is contended that the act is in effect a double tax upon property, and hence lacking in the uniformity required by the State Constitution. But,

as was pointed out by the District Court, the exaction of 4 per cent of the gross intrastate earnings is not a property tax, but was an excise tax, whose amount is fixed and measured by such earnings; and double taxation, in a legal sense, does not exist unless the double tax is levied upon the *same property* within the *same* jurisdiction. Plaintiffs in error pay one tax with respect to property, another with respect to the privilege or occupation; hence the taxation is not double. * * *

"The so-called double tax is also laid hold of as a ground for the contention that there is a denial of equal protection within the meaning of the Fourteenth Amendment. This, however, is but another form of the objections to the classification, which has already been disposed of."

We see, therefore, that the power of the State in the imposition of franchise, license, privilege, and excise taxes for revenue purposes is not restricted by the rules governing *ad valorem* property taxes; that this power is somewhat arbitrary in its nature; and that such taxes may be imposed by the State entirely in addition to all property taxation.

2. *Franchise or privilege taxes on interstate railroads which are valid.*

These principles being well settled, it remains to be seen what effect, if any, does the fact that a railroad is engaged in interstate commerce have upon the right and power of a State to impose upon it such a franchise, privilege, license, or excise tax.

It is settled that corporations, including railroads and other carriers, engaged in interstate commerce, although their

interstate business is free from direct interference or burden by a State through which they pass, are nevertheless subject to the imposition of franchise, privilege, license, or excise taxes upon the privilege or business of engaging in intrastate commerce carried on wholly within that State.

U. S. v. Singer, 15 Wall., 111.
Maine v. Grand Trunk Railway Co., 142 U. S., 217.
Osborne v. Florida, 164 U. S., 650.
Pullman Company v. Adams, 189 U. S., 420.
Horne Silver Mining Co. v. New York, 143 U. S., 305.
Pennsylvania R. Co. v. Knight, 192 U. S., 21.
Home Insurance Co. v. New York, 134 U. S., 594.
New York v. Roberts, 171 U. S., 658.
Flint v. Stone Tracy Co., 220 U. S., 107.
Pullman Co. v. Kansas, 216 U. S., 56, 66, 67.
Baltic Mining Co. v. Massachusetts, 231 U. S., 68.
International Paper Co. v. Massachusetts, 246 U. S., at 141.
St. Louis, etc., R. Co. v. Arkansas, 235 U. S., 350.
Allen v. Pullman Company, 191 U. S., 171.
S. S. White Co. v. Coommonwealth, 212 Mass. 35.
Marconi Co. v. Commonwealth, 218 Mass., 558, 566-567.

In the case of *Osborne v. Florida, supra,* a license tax of Florida on the intrastate business within that State of interstate express companies was held valid, and the case of *Crutcher v. Kentucky,* 141 U. S., 47, a case involving a prohibition against doing any business, whether interstate or intrastate, in Kentucky, except after the payment of a tax,

was clearly distinguished. The Supreme Court of Florida had construed the tax in question as applying only to the intrastate business, and this court followed that decision. The court said:

> "In other words, this statute, as construed by the Supreme Court of Florida, does not exempt the express company from taxation upon its business which is solely within the State, even though at the same time the same company may do a business which is interstate in its character, and that as to the latter kind of business, the statute does not apply to or affect it. As thus construed, we have no doubt as to the correctness of the decision that the act does not in any manner violate the Federal Constitution.
>
> "The case of *Crutcher v. Kentucky,* 141 U. S., 47, is not in the slightest degree opposed to this view. The act which was held to be in violation of the Federal Constitution in that case prohibited the agent of a foreign express company from carrying on business at all in that State without first obtaining a license from the State. The company was thus prevented from doing any business, even of an interstate character, without obtaining the license in question. The act was held to be a regulation of interstate commerce in its application to corporations or associations engaged in that business, and that subject was held to belong exclusively to national and not State legislation.
>
> "It has never been held, however, that when the business of the company which is wholly within the State is but a mere incident to its interstate business, such fact would furnish any obstacle to the valid taxation by the State of the business of the company which is entirely local. So long as the regulation as to the license or taxation does not refer

> to and is not imposed upon the business of the company which is interstate, there is no interference with that commerce by the State statute. It was stated by Mr. Justice Bradley, in the course of his opinion in the *Crutcher Case,* the 'taxes or license fees in good faith imposed exclusively on express business carried on wholly within the State would be open to no such objection,' viz., an objection that the tax or license was a regulation of, or that it improperly affected, interstate commerce. We have no doubt that this is a correct statement of the law in that regard. The statute herein differs from the cases where statutes upon this subject have been held void, because in those cases the statutes prohibited the doing of any business in the State whatever, unless upon the payment of the fee or tax."

The decision in the foregoing leading case of *Osborne v. Florida* was followed and applied to a privilege tax on the intrastate traffic of an interstate Pullman Company. It was argued against the validity of that tax that a clause in the State Constitution made the Pullman Company a common carrier, and that that provision forbade the company to choose whether while engaging in interstate commerce through the State, it would also engage in intrastate commerce within the State. It was argued that if it were forced to take passengers in intrastate commerce by the Constitution of the State, the State could not tax the privilege of engaging in that business.

Pullman Co. v. Adams, 189 U. S., 420, wherein it was said:

> "If the Constitution of Mississippi should be read as imposing an obligation to take local passengers, the question for us might be which, if not both, the clause of the Constitution or the tax act, is invalid."

It held, however, that the Constitution had no such meaning and that the privilege tax on intrastate business was valid.

The Supreme Court reaffirmed this as being the effect of the holding in *Pullman Company v. Adams,* in the later case of *Western Union v. Kansas,* 216 U. S., 1, 41, wherein it was said:

> "So, what was actually decided in the Adams case was that the company was under no obligation to take local passengers, but if it chose to do that kind of business the privilege for doing it could be taxed by the State."

The decisions in *Osborne v. Florida,* and in *Pullman Company v. Adams,* were again followed in *Allen v. Pullman Company,* 191 U. S., 171. In that case it was held that, although a State may not burden interstate commerce, it may impose a privilege tax on corporations engaged in interstate commerce for carrying on that part of their business wholly within the State which does not affect their interstate business or the right to carry it on. It was further held that such tax will not be regarded as a disguised attempt to tax the privilege of engaging in interstate commerce if, under the laws of the taxing State, it is not compulsory for the carrier to do its intrastate business therein, and it may make an election; and it was held that in Tennessee the Pulman Company had such election and the tax on the privilege was valid and not a burden on interstate commerce.

The same rule announced in *Osborne v. Florida* as to express companies and in *Pullman Company v. Adams* and *Allen v. Pullman Company* as to Pullman companies was followed and applied to interstate railroads in the case of

Pennsylvania Railroad Co. v. Knight, 192 U. S., 21, wherein it was held that, although the Pennsylvania company was engaged largely in interstate commerce, it was still amenable to State regulations and State taxation as to any of its service which was performed wholly within the State and not as a part of interstate transportation.

The same principle was applied in the case of *Horne Silver Mining Company v. New York,* 143 U. S., 305, to the case of a privilege tax on a foreign mining corporation for the privilege of doing intrastate business within the State of New York.

The same principle was held in the case of *S. S. White Co. v. Commonwealth,* 212 Mass., 35, which decision was sustained in the appeal of that case to the Supreme Court under the title of *Baltic Mining Co. v. Massachusetts,* 231 U. S., 68.

The *Ohio Tax Cases,* 232 U. S., 576, are recent and conclusive authority as to the right of a State to impose such a tax as North Carolina has imposed in its franchise tax, that is, a tax on the privilege of carrying on an intrastate business of railroading within the State. The tax there involved was a tax upon interstate railroads for the privilege of carrying on business in Ohio. It was measured by 4 per cent of the total gross earnings for the year of such railroads from intrastate business within Ohio, excluding earnings from interstate business. This tax was in addition to *ad valorem* property taxation. It was attacked as double taxation, as denying equal protection of the laws, and as being a burden on interstate commerce. We have already quoted what the Court said as to the double-taxation contention. On the question of burden on interstate commerce it said:

"The tax is, however, in substance as in form, an excise or privilege tax. Its reasonableness, unless some Federal right be violated, is within the discretion of the State Legislature. We have seen that the classification adopted cannot be deemed illusory; that is, there is no apparent violation of the equality provisions of the State Constitution or of the 'equal-protection' clause of the Fourteenth Amendment, although railroad and pipe-line companies are required to pay at the rate of 4 per cent of the annual intrastate earnings, while other public-service corporations pay a less percentage. It is, of course, entirely settled that a State cannot, consistently with the Federal control of interstate commerce, lay such taxes, either upon property rights or upon franchises or privileges, as in effect to burden such commerce. But the line is not always easily drawn, as recent cases sufficiently show. * * * (Citing several.)

"The present act does not on its face manifest a purpose to interfere with interstate commerce, and we are unable to accept the historical facts alluded to as sufficient evidence of a sinister purpose, such as would justify this court in striking down the law. *We could not do this without in effect denouncing the Legislature of the State as guilty of a conscious attempt to evade the obligations of the Federal Constitution.*"

It is clear, therefore, that it is entirely within the competence of a State to impose upon an interstate carrier a franchise or privilege tax for the privilege of carrying on that part of its business which is purely intrastate carried on within the taxing State, provided a measure for the tax be chosen which will not itself have the effect of making the tax a burden on interstate commerce.

It has been judicially determined by this court that the exact wording of the North Carolina statute imposing the franchise or privilege tax here in question, to-wit, "for the privilege of exercising its franchise in this State" has the effect to impose such a tax, that is a tax for the privilege of carrying on purely intrastate commerce within the State, not a tax for the privilege of engaging in interstate commerce in the taxing State and that such a tax is valid and not in conflict with the Constitution of the United States.

Maine v. Grand Trunk Railway Co., 142 U. S., 217.
St. Louis, etc., R. Co. v. Arkansas, 235 U. S., 350.

In the *Maine Case* the Court, Mr. Justice Field writing the opinion, said:

> "The tax, for the collection of which this action is brought, is an excise tax upon the defendant corporation for the privilege of exercising its franchises within the State of Maine. It is so declared in the statute which imposes it; and that a tax of this character is within the power of the State to levy there can be no question. The designation does not always indicate merely an inland imposition or duty on the consumption of commodities, but often denotes an impost for a license to pursue certain callings, or to deal in special commodities, or to exercise particular franchises. It is used more frequently in this country in the latter sense than in any other. The privilege of exercising the franchises of a corporation within a State is generally one of value, and often of great value, and the subject of earnest contention. It is naturally, therefore, that the corporation should be made to bear some proportion of the burdens of the government. As the granting of the privilege rests

> entirely in the discretion of the State, whether the corporation be of domestic or foreign origin, it may be conferred upon such conditions, pecuniary or otherwise, as the State in its judgment may deem most conducive to its interests or policy. It may require the payment into its treasury, each year, of a specific sum, or may apportion the amount exacted according to the value of the business permitted, as disclosed by its gains or receipts for the present or past years. The character of the tax, or its validity, is not determined by the mode adopted in fixing the amount for any specific period or times of its payment. The whole field of inquiry into the extent of revenue from sources at the command of the corporation is open to the consideration of the State in determining what may be justly exacted for the privilege."

It is to be noted also that the dissent in that case was not based at all on the theory that the State did not have the power to levy an excise or privilege tax on the interstate railroad for the privilege of exercising its franchises in the State, or for doing intrastate business within the State, but was based purely on the contention by the minority that gross receipts, including thus receipts from both interstate and intrastate commerce, was an improper measure of such a tax, and constituted it a burden on interstate commerce.

The tax in that case was measured by gross receipts *within the State,* and the majority of the court held that this was valid, and distinguished the case of *Philadelphia, etc., Steamship Co. v. Pennsylvania,* 122 U. S., 326, which involved the validity of a tax in terms upon the gross receipts from both interstate and intrastate commerce, which tax was held to be a burden on interstate commerce.

In the case of *St. Louis, etc., R. Co. v. Arkansas,* 235 U. S., 350, the court construed a statute of Arkansas imposing a franchise tax in the same words employed in the North Carolina statute now in question, that is describing the tax as being "for the privilege of exercising its franchise in this State," and held, following a like holding by the Supreme Court of Arkansas, that the franchise intended to be taxed by the act was that which related solely to intrastate business carried on wholly within the State, that the tax was not upon the privilege of exercising franchises in interstate commerce and was therefore valid and constitutional.

It follows, therefore, that a "franchise or privilege tax" imposed by a State on an interstate railroad "for the privilege of exercising its franchise in this State" is a tax on the privilege of exercising such franchise in the business of purely intrastate commerce within that State, that that is a franchise or privilege within the power of the State to tax; and that a tax upon such privilege is valid provided it be so imposed and measured by such a value that it will not be a direct burden on interstate commerce.

As to what is a valid measure of such a tax, it is beyond doubt that it is competent for the State to measure it by and compute it upon the value of the property of the interstate carrier within the State, thus including no property without the State but only that wholly within the taxing State, and that a franchise or privilege tax so computed is not a burden on interstate commerce.

St. Louis, etc., R. Co. v. Arkansas, 235 U. S., 350;
St. Louis, etc., R. Co. v. Middlekamp, 256 U. S., 226.

In the *Arkansas Case, supra,* this court passed upon the validity of the tax system of Arkansas as relating to railroads.

Statutes of Arkansas imposed property taxes on railroads. In addition they imposed a license fee upon domestic corporations for the privilege of filing their articles of incorporation and upon foreign corporations for the privilege of doing intrastate business in Arkansas. In addition to both those taxes the statutes imposed a franchise or privilege tax, similar to the North Carolina tax now in question. Describing this franchise tax this court in its opinion said:

> "The act is entitled 'An act for an annual franchise tax on corporations doing business in the State of Arkansas.' (Acts of Arkansas, 1911, p. 67.) Its fourth, fifth, and sixth sections require each foreign corporation for profit doing business in the State, and owning or using a part or all of its capital or plant in the State, to pay 'for the privilege of exercising its franchise in this State, one-twentieth of one per cent each year thereafter upon the proportion of the outstanding capital stock of the corporation represented by property owned and used in business transacted in this State.'"

The court construed this tax to be a franchise tax for the privilege of engaging in wholly intrastate commerce within Arkansas, measured solely by reference to the property of the corporation within that State. It said:

> "We therefore accept the construction of Act No. 112, that we have quoted from the opinion of the State court, which is, in short, that it imposes an annual franchise tax upon the right to exist as a corporation or to exercise corporate powers within the State, the amount of the tax being fixed solely by reference to the property of the corporation that is within the State and used in business transacted

> within the State, and excluding any imposition upon or interference with interstate commerce. By this we understand that the franchise of a foreign corporation that is intended to be taxed is that which relates solely to intrastate business;"

and after a review of the authorities as to franchise taxes on interstate carriers the court continued:

> "Applying these principles, we have no difficulty in sustaining the tax in question as a legitimate imposition upon a foreign corporation with respect to its exercise of the privilege of transacting intrastate business in corporate form, *the tax being based upon the amount and value of its property within the State.*" (Italics ours.)

In the *Middlekamp Case,* 256 U. S., 226, an entirely similar franchise tax of Missouri, measured by the amount of the property of the carrier in the State, was held to be no burden on interstate commerce and to be valid. The act provided, as to foreign corporations:

> "Every corporation, not organized under the laws of this State, and engaged in business in this State, shall pay an annual franchise tax to the State of Missouri equal to three-fortieths of one per cent of the par value of its capital stock and surplus employed in business in this State, and for the purposes of this act such corporation shall be deemed to have employed in this State that proportion of its entire capital stock and surplus that its property and assets in this State bears to all its property and assets wherever located * * *."

This tax was in terms, as in the *Arkansas Case,* a percentage of the par value of a certain proportion of the capital stock and surplus, that used in the taxing State, but the way that proportion was measured was simply to take the value of the property in the State. The tax was therefore measured by the total amount of property of the carrier in the taxing State. The court, holding this tax constitutional and valid, said:

> "There is no contravention of the Commerce Clause. It is said that the value of the franchise taxed is derived partly from the fact that the corporation does interstate business, but that does not invalidate the tax. *St. Louis & East St. Louis Electric Ry. Co. v. Hagerman, post,* 314; *St. Louis & East St. Louis Electric Ry. Co. v. Arkansas,* 235 U. S., 350, 365. Of course the fact that the plaintiff's road was under Federal control during the year in question does not exonerate it. It was profiting by its franchises although in a different way. * * * Nothing more needs to be said concerning the relation of the act to the Constitution of the United States."

An attempt was made by the plaintiffs in these suits in the District courts to distinguish the *Arkansas Case* and they argued that it is not authority for the proposition that the entire property of an interstate carrier in the taxing State is a valid measure to be taken for a franchise or privilege tax, contending that the tax there was not measured by the property of the railroad in the State but by the proportion of its capital stock used in the State.

But this court said in that case that this amounted to measuring the franchise tax by the property in the State, because the statute, just as that construed in the *Middle-*

kamp Case, took the total property in the State as the measure of what the proportion of the capital stock used in the State was. It makes no difference whether the tax statute says in so many words that it imposes a tax of a certain per cent of the property in the State, or says a tax of a certain per cent of the proportion of the company's capital stock used in the State and uses the total property in the State as the measure of that proportion. In either case the franchise tax is measured in effect by the property in the State. And it was specifically on the assumption that it was a franchise tax measured by the property of the company in Arkansas that this court held the franchise tax of that State valid in the *Arkansas Case.*

This is in exact accord with what was held in the case of *Western Union v. Massachusetts,* 125 U. S., 530, 552, cited to this effect in the *Arkansas Case,* wherein the court held specifically that a tax nominally upon the capital stock was in effect a tax measured by the property of the corporation in Massachusetts. It was there said:

> "The tax in the present case, though nominally upon the shares of the capital stock of the company, is in effect a tax upon that organization on account of property owned and used by it in the State of Massachusetts, and the proportion of the length of its lines in that State to their entire length throughout the whole country is made the basis for ascertaining the value of that property."

Thus it is seen that a State may validly impose upon interstate carriers a franchise or privilege tax for the privilege of carrying on wholly intrastate business within the taxing State as a corporation; that a tax which in terms is

imposed "for the privilege of exercising its franchise in the State," as applied to an interstate railroad, is a tax for the privilege of carrying on wholly intrastate business within the taxing State as a corporation, and that such a tax is constitutional and valid when measured by the total property of the said railroad within the taxing State. Such a tax is not a burden on commerce and is within the power of the State to impose.

3. *Franchise or Privilege Taxes on Interstate Railroads Which are Beyond the Power of a State and Invalid.*

In the foregoing section we have seen the kinds of franchise or privilege taxes upon interstate railroads which are constitutional and valid. A brief reference to the classes of cases in which such taxes are held invalid as being in effect a burden on interstate commerce will disclose the line between those that are valid and those that are invalid, a distinction or line referred to in the *Ohio Tax Cases* as "not always easily drawn."

Thus, as was shown in *Osborne v. Florida,* the State cannot require the payment of a privilege or franchise tax as a *condition precedent* to the right of the carrier to do any kind of business in the State, for such a requirement would, if valid, stop interstate commerce, as well as intrastate commerce.

Western Union v. Kansas, 216 U. S., 1;
Ludwig v. Western Union, 216 U. S., 146;
International Paper Co. v. Massachusetts, 246 U. S., 141;
Leloup v. Mobile, 127 U. S., 640.

So it is incompetent for the State to measure its privilege or license tax by the *total capital stock* of the carrier representing property both within and without the State, and representing its total business of both interstate and intrastate commerce. A tax so measured is uniformly held to be in necessary scope and effect a direct burden on interstate commerce, even though in terms it purports to be only for the privilege of engaging in intrastate commerce.

Western Union v. Kansas, 216 U. S., 1;
Pullman Co. v. Kansas, 216 U. S., 56;
Looney v. Crane Co., 245 U. S., 178;
International Paper Co. v. Massachusetts, 246 U. S., 135.

And where such a tax is measured by the gross revenue of the carrier, which necessarily includes revenue from the business of interstate commerce as well as that from the business of intrastate commerce, it is uniformly held to be invalid as being in necessary effect a direct burden on interstate commerce, although in terms it purports to be levied on or for the privilege of engaging in intrastate commerce.

Fargo v. Michigan, 121 U. S., 230;
Philadelphia Steamship Co. v. Pennsylvania, 122 U. S., 326;
Ratterman v. Western Union, 127 U. S., 411;
Western Union v. Alabama, 132 U. S., 472;
Galveston, etc., R. Co. v. Texas, 210 U. S., 217;
Meyers v. Wells Fargo Co., 223 U. S., 298.

And an excise on telegraphic messages, including not only those from point to point within the State, but also those coming into the State from other States and those going out

of the State, is invalid as a burden on interstate commerce, except as to that part which imposes a tax on messages from point to point within the State.

Western Union v. Pennsylvania, 128 U. S., 39.

There is no conflict, however, between the foregoing cases, and the line of cases which we have referred to as holding such taxes valid when measured by the total property of the carrier *within the State,* or by the gross earnings of the carrier from intrastate business alone, or by the proportion of the total capital stock of the carrier corresponding to the ratio of the property within the State to the total property everywhere. Each of these lines of cases recognizes specifically the correctness of the other.

Thus, in the case of *Galveston, etc., R. Co. v. Texas,* 210 U. S., 217, holding invalid a State tax measured by a percentage of the *total gross earnings* of an interstate railroad, the case of *Maine v. Grand Trunk Railway,* 142 U. S., 217, wherein such a tax, measured only by the *gross earnings within the State,* was held valid, was specifically approved, distinguished, and held not to be in conflict with the decision in the *Galveston case,* nor with the similar decision in the case of *Philadelphia Steamship Co. v. Pennsylvania,* 122 U. S., 326.

And *Western Union v. Kansas,* 216 U. S., 1, which held invalid such a tax, measured by a percentage of the *entire capital stock* of an interstate carrier, representing property out of the State as well as within, and interstate business as well as intrastate, specifically approved the case of *Western Union v. Masachusetts,* 125 U. S., 530, wherein the tax was measured only by the *mileage proportion* of the capital stock

within the State. The decision in *Western Union v. Kansas* furthermore specifically approved and carefully distinguished *Osborne v. Florida, Pullman Company v. Adams, Allen v. Pullman Company,* and *Security Mutual Co. v. Previtt,* 202 U. S., 246, 248.

One other limitation upon the right of a State to impose such franchise, privilege, license, or excise tax upon the privilege of exercising franchises within the State, or upon the intrastate business, of an interstate carrier should be noted, and that is, that such a tax will be invalid as a direct burden on interstate commerce if it discriminates against foreign corporations in favor of domestic corporations of the same class, as where the statute seeks to impose such a tax on foreign railroads, but leaves domestic railroads free from such imposition.

Southern Railway Co. v. Greene, 216 U. S. 400.

Where, however, there is no such discrimination, and the tax is imposed alike upon domestic corporations and foreign corporations, it does not lie in any foreign corporation to complain that it is subjected to the same laws with the domestic corporation.

Horne Silver Mining Co. v. New York, 143 U. S., 305, 315.

New York v. Roberts, 171 U. S., 658, both of which cases were specifically distinguished in the case of *Southern Railway Co. v. Greene, supra.*

IV.

The franchise or privilege tax imposed by North Carolina on the plaintiffs and other railroads is within the power of the State to impose and is valid.

We shall now consider *seriatim* the objections raised by the plaintiffs to the validity of the franchise or privilege tax and undertake to show that it is entirely valid.

1. *It is not a property tax, but is a privilege tax.*

The first contention of the plaintiffs is that this tax is not a privilege or franchise tax, though called such in the statute, but is a property tax, and therefore amounts to double taxation of the property of railroads in violation of a supposed prohibition of double taxation in the State and in the Federal Constitutions.

They contend that any tax which is measured by property is a property tax, and that therefore this tax is not a privilege tax but is a property tax because it is measured by a percentage of the property of the taxed railroad in the State.

There can be no doubt that the Legislature of North Carolina intended to impose it as a privilege tax, and has done so if it is within its power to impose a privilege tax measured in amount by reference to property.

Section 3 of the Revenue Act of 1921, the act which imposes this tax, provides:

> "*No tax on any property* in the State shall be levied for any of the uses of the State Government. The taxes *hereinafter levied in this act* are for the expenses of the State Government. * * * and shall be collected and paid into the general fund of the State Treasurer."

It will thus be noticed that the Revenue Act starts with an express declaration of the Legislature that none of the taxes levied in and by that act is a property tax.

In the introductory section of Schedule C of that act, Section 76, it is declared:

> "Sec. 76. *Defining taxes embraced in this schedule.* "The taxes embraced in this schedule shall be listed and paid as specially herein provided, and shall be *for the privilege* of carrying on the business or doing the act named; and, if a corporation, shall be a tax for the continuance of its corporate *rights and privileges* given under its charter, if incorporated in this State; or by reason of any act of domestication, if incorporated in another State."

Section 82 (6½) in said Schedule C, the section imposing the tax, calls it "a franchise or privilege tax" and "the franchise tax, * * * for the privilege of exercising its franchise in this State."

The Legislature could not have chosen more apt words to declare that the tax was not a property tax, but that it was a privilege tax.

But the plaintiffs contend that, because the basis upon which the franchise tax is calculated is "the value of the property, tangible and intangible, of each such railroad company in the State assessed for the year * * * for *ad valorem* taxes," it is therefore necessarily, as matter of law, a property tax, notwithstanding what the Legislature intended and declared it to be. In other words, the entire contention under this head is, that any tax which is measured by a percentage of the value of property is a property tax, no matter what the lawmaking body declares and intends it to be.

To sustain this proposition, the plaintiffs cite the cases of

Worth v. Railroad, 89 N. C., 301; *Provident Institution v. Massachusetts,* 6 Wall., 611, and other cases which hold, not that a tax which is measured by property is necessarily a property tax, but that a tax which is not measured by property, but is measured by amount of business, is not a property tax, but a franchise or privilege tax.

We have already seen, however, that this Court in the cases of *St. Louis, etc., R. Co. v. Arkansas,* 235 U. S., 350, and *St. Louis, etc., R. Co. v. Middlekamp,* 256 U. S., 226, has held valid as franchise or privilege taxes on railroads taxes measured by a certain proportion of their property within the State. And in the *Middlekamp Case* this same contention of double taxation was made by the plaintiff railroad. After the decision in those cases we do not see how it can be contended that the fact that a tax imposed as a privilege tax is measured by reference to property can change its nature from a privilege tax to a property tax, or render it invalid as a privilege tax.

We are not confined to those decisions, however. It is well settled by many cases that the fact that a tax on or for a privilege (whether called franchise, privilege, license, or excise tax) is measured by property, or its value, does not make it a property tax.

Magoun v. Ill. Trust Bank, 170 U. S., 283.
Clark v. Titusville, 184 U. S., 329.
Keeney v. New York, 22 U. S., 525.
Baltic Mining Co. v. Massachusetts, 231 U. S., 68.
Brushaber v. Union Pac. R. Co., 240 U. S., 1.
Kansas City R. Co. v. Kansas, 240 U. S., 227.
Kansas City R. Co. v. Stiles, 242 U. S., 111.
Republic Acceptance Corp. v. De Land, 275 Fed., at 630, and cases cited.

In the case of *Baltic Mining Co. v. Massachusetts, supra,* speaking of an excise tax on corporations for the privilege of engaging in intrastate commerce within the State, and measured by capital stock representing property, the Court said:

> "In these cases the ultimate contention is not that the receipts from interstate commerce are taxed as such, but that the property of the corporation, including that used in such commerce, represented by the authorized capital of the corporation, is taxed, and therefore interstate commerce is unlawfully burdened by a State statute. * * * The conclusion that the authorized capital, is only used as the measure of a tax, in itself lawful, without the necessary effect of burdening interstate commerce, brings the legislation within the authority of the State. So, if the tax is, as we hold it to be, levied upon a legitimate subject of such taxation, it is not void because imposed upon property beyond the State's jurisdiction, for the property itself is not taxed. Insofar as it is represented in the authorized capital stock, it is used only as a *measure* of taxation, and, as we have seen, *such measure may be found in property* or in the receipts from property not in themselves taxable."

And in the case of *Keeney v. New York, supra,* the court said of a tax on the privilege of transfers:

> "Wherever the amount of a tax is, as here, to be measured by the value of property, it has been earnestly argued that it was to tax the property itself, and that to ignore that feature is to put the name above the fact. But when the State decides to impose such a tax the amount must be determined by some standard. To require the same amount to be paid on all

transfers is not so fair as to impose the burden in proportion to the value of the property. An excise on transfers, therefore, does not lose that character because the amount to be paid is determined by the values conveyed. In view of the decisions in *Magoun v. Illinois Trust Bank,* 170 U. S., 283, and other cases cited, it is unnecessary to review the arguments pro and con, and again point out the distinction which has been made and sustained between excise and *ad valorem* taxes."

In the case of *Republic Acceptance Corp. v. De Land,* 275 Fed., at 639, it was said in a very well considered opinion:

"Nor does the fact that the amount of the tax to be levied * * * is measured and determined by the sliding scale (on capital stock representing property) use as the basis for the computation thereof, render it any the less an excise tax, or operate to give it the character of a property tax. *Clark v. Titusville,* 184 U. S., 329; *Kansas City R. Co. v. Botkin,* 240 U. S., 227; *Union Trust Co. v. Probate Judge,* 125 Mich., 487."

"As therefore the premise of this argument, that the tax is a property tax, is clearly unsound, the contention based thereon, to the effect that such tax lacks the uniformity required by the Michigan Constitution, is equally without merit. It follows that, so far as such contention is concerned, the claim of the defendants that it appears upon the face of the bill that the plaintiff is not entitled to the relief prayed, must be sustained."

And the fact that the final incidence of such a tax is on an individual, or a property owner, using his property in the business, does not render it a property tax.

Clark v. Titusville, 184 U. S., 329, wherein it was said by Mr. Justice McKenna:

> "Plaintiff in error, however, contends that the tax in the case at bar is a tax on property, not on the privilege to do business, because the final incidence of the tax is on the merchant, and is paid by him. But every tax has its final incidence on some individual. The effect, therefore, cannot be urged to destroy well-recognized distinctions. The tax in the case at bar is a tax on the privilege of doing business regulated by the amount of sales, and is not repugnant to the Constitution of the United States."

Thus a franchise tax of Alabama based on capital stock of a railroad doing both interstate and intrastate business was held valid and no burden on interstate commerce because it was not a property tax, but a privilege tax.

Kansas City R. Co. v. Stiles, 242 U. S., 111, following
Kansas City R. Co. v. Stiles, 240 U. S., 227, and distinguishing
Southern Railway Co. v. Greene, 216 U. S., 400, and
Western Union v. Kansas, 216 U. S., 1.

And it is elementary that when capital stock of a corporation is taken as the measure of a tax the capital stock stands for and represents the property owned by the corporation and that a tax so measured is in effect measured by the corporation's property.

A tax measured by three-fourths of one per cent of the total amount of deposits in savings banks on a certain day has been held by this Court to be a franchise tax, not a property tax. Yet no one would contend that the total of

deposits in savings banks on a certain day is not property. The Connecticut tax held to be a franchise tax was certainly measured by property.

Society for Savings v. Coite, 6 Wall., 594.

And a Massachusetts tax on the excess of market value of capital stock over the value of real estate and machinery of corporations was held to be a franchise tax, not a property tax.

Hamilton Co. v. Massachusetts, 6 Wall., 632.

A Massachusetts tax on domestic saving banks, measured by a certain per cent of the amount of deposits averaged for a period, was held to be a franchise and not a property tax.

Provident Institution v. Massachusetts, 6 Wall., 611.

It is clear, therefore, that the fact that a tax is measured by property does not make it a property tax, and that the authorities are conclusive that a tax may be a franchise or privilege tax and still may be measured by property.

As to a tax upon a corporation denominated by the Legislature a privilege fee or tax for the privilege of exercising its franchise and of transacting its business within a State, it cannot be doubted that the specific declaration of the Legislature of the purpose for which the tax is levied stamps it as an excise or privilege tax rather than a property tax.

Republic Acceptance Corp. v. DeLand, 275 Fed., 639, citing

Kansas City, etc., R. Co., v. Botkin, 240 U. S., 227;

Lusk v. Botkin, 240 U. S., 236;

Kansas City, etc., R. Co. v. Stiles, 242 U. S., 111;

Illinois Central Co. v. Mississippi R. Comm., 229 Fed., 248;
Coit, etc., Co. v. Sutton, 102 Mich., 324;
Pingree v. Auditor, 120 Mich., 95;
Union T. Co. v. Probate Judge, 125 Mich., 487;
Union Trust Co. v. Detroit Council, 170 Mich., 692;
26 Ruling Case Law, p. 35.

The franchise or privilege tax on railroads here discussed is only one of the many license, privilege, or franchise taxes, so-called, imposed by Schedules B and C of the Revenue Act (See Appendix D). It is similar and analogous to the others. The Supreme Court of North Carolina and this Court have held taxes imposed by these two schedules to be license or privilege taxes and not property taxes.

State v. French, 109 N. C., 722, 724-725;
Lacy v. Armour Packing Co., 134 N. C., 567;
Armour Packing Co. v. Lacy, 200 U. S., 226.

2. *But even if it were a property tax, it would not follow that it is unconstitutional or invalid.*

Assuming for the sake of argument, however, that the tax called by the Legislature of North Carolina a "franchise or privilege tax" must be construed to be a property tax, as the plaintiffs contend, because measured by reference to property, it would not follow that it is in violation of either the State or Federal Constitutions.

As was held in the case of *St. Louis, etc., R. Co. v. Arkansas,* 235 U. S., 350, it matters not whether such a tax be deemed a privilege tax or a tax on a privilege or right (as

the privilege of engaging in intrastate commerce) considered as property. In either aspect it is a tax on a subject matter within the power of the State to tax and is no violation of the Federal Constitution. If it would be valid under the Federal Constitution when construed as a privilege tax, construing it as a property tax could not render it invalid. It is a question of power, not of definition of terms.

The reason the plaintiffs advance why this tax, if construed as a property tax, should be deemed invalid is that they contend that it would amount to double taxation of railroads and that that is a violation of the uniformity clause of the North Carolina Constitution and of the Fourteenth Amendment.

But double taxation by a State is not forbidden by the Federal Constitution. It is well settled that nothing in that instrument or in the Fourteenth Amendment prevents the States from imposing double taxation or any other form of unequal taxation, so long as the inequality is not based on arbitrary distinction.

Davidson v. New Orleans, 96 U. S., 97, 106;
Coe v. Errol, 116 U. S., 517, 524;
Tennessee v. Whitworth, 117 U. S., 129, 136, 137;
Kidd v. Alabama, 188 U. S., 730, 732;
St. Louis, etc., R. Co. v. Arkansas, 235 U. S., 350;
Fidelity, etc., Trust Co. v. Louisville, 245 U. S., 54, 59;
Shaffer v. Carter, 252 U. S., 37, 58;
Cream of Wheat Co. v. Grand Forks, 253 U. S., 325, 330.

And we have already shown that classification together of all railroad corporations and the imposing on that class of a tax different from that imposed on other classes is competent classification and is not based on an arbitrary distinction.

Double taxation, is therefore, within the legitimate power of the State unless forbidden by the State Constitution.

Cases cited, *supra,* and in addition:

Commissioners v. Tobacco Co., 116 N. C., 441;
Belo v. Commissioners, 82 N. C., 415;
See also *Fort Smith Lumber Co. v. Arkansas,* 251 U. S., 532.

And the Supreme Court of North Carolina holds that the uniformity rule in the Constitution of that State does not take away the legislative power to levy double taxation, and that the Legislature of North Carolina has that power.

Commissioners v. Tobacco Co., 116 N. C., 441, 448;
Belo v. Commissioners, 82 N. C., 415;
State v. Wheeler, 141 N. C., 773.

It seems clear, therefore, that even if this tax were to be construed as a property tax, it could not be invalid as double taxation by reason of any conflict with the Federal Constitution, that the Supreme Court of North Carolina holds that double taxation is not forbidden by the uniformity clause of the State Constitution, that this Court will follow that holding of the State Supreme Court, and that the said tax could not be held invalid in these suits as double taxation.

There is no basis, however, we contend, for considering it a property tax. It must be construed to be what the Leg-

islature intended, to-wit, a franchise or privilege tax, and we shall consider its validity as such.

3. *It is not a tax for the privilege of engaging in interstate commerce.*

The second contention of the plaintiffs is that if this tax is to be construed as a privilege tax and not a property tax, it must be construed as a tax for the privilege of engaging in interstate commerce, and is hence invalid as being a burden on such commerce.

After these suits were started in the District Courts in 1921, there was held a special session of the Legislature of North Carolina in December of that year. This attack of the plaintiffs on the franchise or privilege tax had then been made. They had then made their contention that this tax was upon the privilege of engaging in interstate commerce, if a privilege tax. And this special session of the Legislature in December, 1921, in order to make it perfectly clear that North Carolina was making no attempt to tax the privilege of doing interstate commerce, added to the section imposing this tax the following:

> "*Provided,* that it is the intention of this section to levy upon railroads a license or privilege tax for the privilege of engaging in intrastate commerce carried on wholly within the State of North Carolina, and not a part of interstate or foreign commerce; that the tax provided for in this section is not intended to be a tax on the privilege of engaging in interstate commerce, nor is it intended to be a tax on the business of interstate commerce, nor is it intended to be a tax having any relation to the inter-

> state or foreign business or commerce in which any such railroad company may be engaged in addition to its business in this State."

And in the body of the section the language was changed so that, instead of calling the tax a "franchise or privilege tax" and "the franchise tax of each such railroad company for the privilege of exercising its franchise in this State," it now denominates the tax "the tax which every railroad company shall pay for the privilege of carrying on intrastate commerce within this State."

We understand that the plaintiffs admit that under the wording of the statute as amended by the special session of 1921 it cannot be a tax on the privilege of engaging in interstate commerce because of the specific declaration of the Legislature to the contrary.

But our contention is that these changes, made by the Legislature after the principal railroads in North Carolina had joined in bringing suits to tie up all collection of revenues from them pursuant to this statute, were made to declare the purpose of the Legislature not to tax the privilege of doing interstate commerce and that this was also a declaration of what the intention was in originally enacting the franchise or privilege tax statute.

The only question, however, upon this contention of the plaintiffs is: what do the words of the statute under which the 1921 franchise or privilege tax was levied mean as matter of law, a tax on the privilege of engaging in interstate commerce or a tax for the privilege of engaging in wholly intrastate commerce carried on entirely within North Carolina?

Those words are "the franchise tax of each such railroad company *for the privilege of exercising its franchise in this State.*" The plaintiffs contend that as matter of law the italicized words mean a tax for the privilege of engaging in interstate commerce. We contend that as matter of law they mean a tax for the privilege of engaging in that part of the business of the railroad which is purely intrastate commerce carried on wholly within the State and separate and apart from interstate and foreign commerce, just as the statute now declares after the changes in December, 1921.

We say, in the first place, that here are two constructions of the language of this statute—one which will, beyond doubt, render the statute invalid; the other, more reasonable on its face—which will render the statute constitutional. Under the most familiar principles, the Court will adopt the construction which comports with constitutionality.

Ohio Tax Cases, 232 U. S., 576.

We say, in the second place, that here is statutory language which this court has held, in at least two cases, to mean a tax for the privilege of engaging in strictly intrastate commerce within the State—not for the privilege of interstate commerce. Those two cases are *Maine v. Grand Trunk Railway*, 142 U. S., 217, and *St. Louis, etc., R. Co. v. Arkansas*, 235 U. S., 350. Both those cases construed statutes in the identical language of ours "for the privilege of exercising its franchises in the State," and held that those words meant only in intrastate commerce—not interstate commerce.

The plaintiffs argued at the hearing that *Maine v. Grand Trunk Railway Co.* had been virtually overruled, but on other phases of the decision. In no case has the construc-

tion of this particular language which appears in our statute, as it was construed in the *Grand Trunk Case*, been criticized or doubted, and in the *Arkansas Case* the same construction of the same wording in a State statute was made and the *Grand Trunk Case* followed. We cited it above as to the meaning of this language of the statute, and it is undoubted authority as to this. Besides, as we have already shown, the *Grand Trunk Case*, far from being overruled, was approved and distinguished in the case of *Galveston, etc., R. Co. v. Texas*, 210 U. S., 217.

The only respect in which the *Grand Trunk Case* has been modified or doubted is in reference to its holding that gross earnings constitute a valid measure of such a franchise or privilege tax. It has never been modified as authority for the proposition that a tax on a foreign railroad "for the privilege of exercising its franchise in the State" is a tax on the privilege of carrying on purely intrastate commerce within the State. And the *Arkansas Case* is a very recent and conclusive authority for the same proposition.

We say, in the third place, that the Legislature of North Carolina, when it first enacted the section containing this language descriptive of the franchise tax, must have taken it from the Maine statute and the Arkansas statute, both containing the same wording, and which had been passed upon and construed by this court. We say that, under the familiar rule of construction, the Legislature must be deemed to have adopted the judicial construction of these statutes together with their wording, and that therefore that wording, as it appears in our statute, means "in intrastate commerce" as much so as if those words were written in the statute.

We say, in the fourth place, that a tax levied by the Revenue Act of North Carolina, correlative with and virtually identical in terms and effect with, this tax, has already been specifically held by the Supreme Court of North Carolina to be a tax on the privilege of engaging in strictly intrastate business within the State, and not to be a tax for the privilege of engaging in interstate commerce, and hence not a violation of the commerce clause; and that this ruling of the State Supreme Court was followed and specifically approved by this Court.

Lacy v. Armour Packing Co., 134 N. C., 567;
Armour Packing Co. v. Lacy, 200 U. S., 226.

The tax construed in those cases was one of the license or privilege taxes imposed by Schedule B of the Revenue Act, which schedule was introduced by the following language in its introductory section:

> "Taxes in this schedule shall be imposed as license tax *for the privilege of carrying on the business or doing the act named.*"

And the section imposing the tax was:

> "*Packing houses.* Upon every meat packing house doing business in this State, one hundred dollars for each county in which said business is carried on."

The packing company there contended that since the tax was imposed as a license or privilege tax simply for "doing business in this State," that included interstate commerce as well as intrastate commerce and the tax was hence a tax on the privilege of engaging in interstate commerce. This contention was exactly the same in effect as that made by the

plaintiffs in these suits that since the tax is simply "for the privilege of exercising its franchise in this State" it includes exercising the franchise in interstate as well as intrastate commerce, since interstate commerce is not in terms excluded, and that the tax is therefore on the privilege of engaging in interstate commerce.

The Supreme Court of North Carolina in the case before it declared that the statute applied solely to business carried on wholly within the State, and was not a tax on the privilege of engaging in interstate commerce. And this court followed and approved that decision, saying:

> "As was said in *Osborne v. Florida,* this construction of a State statute by its highest court is not open to review, and accepting it the case plainly comes within *Kehrer v. Stewart,* 197 U. S., 60."

These decisions we deem to be conclusive that the Legislature of North Carolina, in enacting the franchise or privilege tax on railroads here in issue intended to impose a tax on the privilege of engaging in purely intrastate commerce and not on the privilege of engaging in interstate commerce, and that the meaning of the said statute is in accordance with that intention.

We say, in the fifth place, that the court cannot construe this language of the North Carolina statute as levying a tax for the privilege of engaging in interstate commerce, or a tax interfering in any way with interstate commerce, "without in effect," as was said in the *Ohio Tax Cases,* 232 U. S., 576, "denouncing the Legislature of the State as guilty of a conscious attempt to evade the obligation of the Federal Constitution." This, as the Supreme Court held in that case, a court will not do.

It follows we think clearly that the franchise or privilege tax on railroads is not a tax on the privilege of engaging in interstate commerce and has no reference to any interstate or foreign commerce but is a tax on the privilege of engaging in intrastate commerce carried on wholly within the State and separate from the railroads' other business.

4. *The payment of This Tax is not Made a Condition Precedent to the Right to Engage in Interstate Commerce Within North Carolina.*

The plaintiffs again contend, however, that the said statute makes the payment of this franchise tax a condition precedent to the doing of interstate business in the State and that it is therefore invalid under the rule of *Western Union v. Kansas,* 216 U. S., 1, *Ludwig v. Western Union,* 216 U. S., 146, *International Paper Co. v. Massachusetts,* 246 U. S., 141, and *Leloup v. Mobile,* 127 U. S., 640, to which we referred above.

This contention is predicated upon the fact that in section 82 (17) the Revenue Act provides in substance, that if a corporation, wherever organized, fails for ninety days to pay the tax levied under this statute the Commissioner of Revenue shall certify the fact to the Secretary of State and that officer shall thereupon "cancel the certificate of authority of any such foreign corporation to do business in the State" and that thereupon all the privileges and franchises "conferred upon such corporation by such certificate" shall cease and determine.

The answer to this is that this part of the statute has absolutely no application to railroads. No railroad doing busi-

ness in North Carolina, none of the plaintiffs, is required to file any such certificate of authority to do business in the State and none has any such certificate on file in the office of the Secretary of State.

The statute cannot apply to any railroad because there is no such certificate or paper in existence to be cancelled by the Secretary of State even if he should desire to do so. There is no crime or penalty contemplated by the statute, except after such cancellation. These provisions have never been held to apply to railroads and no attempt has ever been made so to apply them. The State officials in their answers expressly declare that they will never be applied to the plaintiffs (Norfolk Southern Record, 42-43), and that the statute gives the Secretary of State no authority to cancel or annul the right of the plaintiffs to carry on interstate commerce in North Carolina.

It would seem that it is early enough for the plaintiffs to complain of these provisions when some effort is made to invoke them against the plaintiffs.

Besides, the provisions referred to by the plaintiffs do not purport to establish a condition precedent to the right to do business even in the cases where they apply, but on the other hand establish a condition subsequent, provide for the taking away of privileges which have already been granted, not for the grant of privileges only upon certain conditions precedent. And in any case these provisions are bound to be correlative with the intrastate business taxed, and could not be deemed to extend to any privilege of engaging in interstate commerce, for that is not taxed.

The statute does not purport or attempt to make the payment of the franchise or privilege tax a condition precedent

to the right of the plaintiffs to carry on any kind of business in North Carolina, much less interstate commerce and it imposes no burden on such commerce.

5. *This tax is a valid tax of the privilege of engaging in intrastate commerce carried on wholly within North Carolina, calculated upon a valid measure, the total property of the railroad in North Carolina.*

The franchise or privilege tax, therefore, is not a property tax as contended by the plaintiffs. If it were it would not follow that it is invalid. It is a privilege tax. It is not, as the plaintiffs contend, a tax on the privilege of engaging in interstate commerce but is a tax on the privilege of engaging in intrastate commerce carried on wholly within North Carolina. Its payment is not made a condition precedent to the right to engage in interstate commerce nor even to the right to engage in intrastate commerce. Its collection is left to the ordinary means of enforcement of taxes.

It is not only such a privilege tax but is calculated upon what under all the authorities is a perfectly competent measure, to-wit, the property of the taxed railroad situated in North Carolina and used by it in that State. This we submit is not only a proper measure, but is one which is the safest and the furthest from any tendency to burden interstate commerce. It is not measured by gross earnings, as the tax declared invalid in the *Galveston Case*. It is not measured by the total property of the railroad within and without the State nor by its total capital stock representing such total property. It is measured only by the property actually in

North Carolina and does not look beyond the borders of that State.

The plaintiffs seek to argue that the franchise tax is a burden on interstate commerce, as measured by property in the State, because net earnings are, in part at least, represented in property values in the State. Of course, the answer to this is apparent: if it is competent to impose property taxes on values which in part represent net earnings, it is equally competent to impose otherwise competent privilege taxes measured by property values similarly representing net earnings in part. A more complete answer is, that this Court has held in the *Ohio Tax Cases, supra,* that such a privilege tax is valid even where based on gross earnings in the State, and gross earnings include interstate business and revenues, while net earnings do not.

The statute imposing this tax is not invalid as making payment of the tax a condition precedent to the right to carry on interstate commerce.

It is not a tax imposed so as to discriminate against interstate carriers or foreign corporations, such as was denounced in *Southern Railway Co. v. Greene,* 216 U. S., 400. It is a tax imposed upon all railroads, domestic and foreign, interstate and intrastate. And as we remarked in our statement at the beginning of this brief railroad corporations of each of these classes are parties plaintiff in these suits, all attacking this statute with the same contentions and on the same alleged grounds.

We submit that in imposing it the Legislature of North Carolina has studiously avoided taking any measure of the tax that could in any way operate as a burden on interstate

commerce, and instead has taken as the measure only the property of each railroad in that State.

It will be recalled that other corporations than railroads are subjected to privilege, franchise, and license taxes, and that individuals are subjected to a great number of occupation, license, and privilege taxes in no way essentially different from this privilege tax on railroads. We do not see that the plaintiffs have any valid reason to complain of this tax.

6. *There is no merit in the contention of the plaintiffs that this tax is in violation of the Constitution of North Carolina because its avails go to support the State Government and the avails of property taxes go to support local subdivisions.*

The plaintiffs argue that this tax is invalid as well as the property taxes of everybody in the State, because under the system created by the statutes of North Carolina, all avails of property taxes are applied to the support of political subdivisions of the State and the avails of the various taxes imposed by the Revenue Act, to-wit, the various license, privilege, franchise, occupation and other similar taxes there imposed, are applied to the support of the State Government. We have already shown in Part I of this brief that there is no merit in this contention and we need not advert to it further here.

7. *The State of North Carolina does not compel the plaintiffs to engage in intrastate commerce and it has, therefore, the right to tax the privilege of so doing.*

But the plaintiffs argue, just as it was argued by the plaintiff in the case of *Pullman Company v. Adams,* 189 U. S.,

420, that the State requires the plaintiffs to engage in intrastate business within the State and that therefore the State has no right to tax as a privilege this right which it imposes upon them.

In the *Pullman Company Case, supra,* this argument as we have seen was grounded on a provision of the State Constitution which made a Pullman Company a common carrier. The Pullman Company contended that that provision made it compulsory upon it to engage in intrastate commerce as well as in interstate commerce.

This Court in its opinion suggested, in the passage we have already quoted, that if the provision of the Constitution of the State of Mississippi referred to was to be read as requiring the Pullman Company to engage in intrastate commerce in Mississippi, then the question might be whether the Constitution of Mississippi did not violate the commerce clause of the Federal Constitution. It was, however, held that no such meaning could be read into that constitutional provision. And this holding was reaffirmed in *Western Union v. Kansas,* 216 U. S., 1, in the passage which we have already quoted from the opinion in that case.

Similarly the plaintiffs in these suits ground their contention that North Carolina requires them to engage in intrastate commerce within its borders and therefore cannot tax the privilege of engaging in such commerce upon Section 3515 of the Consolidated Statutes, which reads as follows:

> "Agents or other officers of railroads and other transportation companies whose duty it is to receive freights shall receive *all articles of the nature and kind received by such company for transportation* whenever tendered at a regular depot, station, wharf,

> or boat landing, and every loaded car tendered at a side track, or any warehouse connected with the railroad by a siding, and shall forward the same by the route selected by the person tendering the freight under existing laws; and the transportation company represented by any person refusing to receive such freight shall forfeit and pay to the party aggrieved the sum of fifty dollars for each day such company refuses to receive such shipment of freight, and all damages actually sustained by reason of the refusal to receive freight."

Upon its face this statute is no requirement that interstate railroads operating through North Carolina shall engage in intrastate commerce whether they wish to or not. It is simply a statute imposing a penalty as the sanction to prevent discrimination. It only purports to apply to a failure or refusal of a railroad to "receive all articles of the nature and kind received by such company for transportation." In other words, if a railroad has voluntarily entered upon the business of transporting freight in intrastate shipments entirely within North Carolina the statute imposes a penalty to prevent it from refusing to receive from one shipper freight of the kind which it is already voluntarily receiving from others.

So far as we can find it has never been held or intimated by the Supreme Court of North Carolina that the effect of this statute is to require a railroad having a line through North Carolina to engage in intrastate commerce whether it wishes to or not. And we submit that if it were held to have that meaning the question would be, as suggested in *Pullman Company v. Adams,* whether that statute was not in conflict with the commerce clause of the Federal

Constitution as requiring an interstate carrier to engage in an intrastate business which it did not desire to undertake.

It is plain, however, that the statute has no such meaning, that it applies only after the railroad has voluntarily engaged in intrastate commerce, and applies then merely to prevent discrimination in the service undertaken.

Some of the plaintiffs cited below the case of *Reid v. Railroad,* 149 N. C., 423, as holding that this statute was a mandatory requirement that railroads having lines in North Carolina must engage in intrastate commerce. There was no such holding in that case. It did not even involve a transaction in intrastate commerce. It was a case in which the Supreme Court of North Carolina held that the penalty statute applied to *interstate* shipments and was not a burden on interstate commerce. This case was reversed by this Court, reviewing it on writ of error, and holding that the penalty statute was unconstitutional and invalid as applied to interstate shipments. *Southern Railway v. Reid,* 222 U. S., 424.

There is nothing, therefore, in the statute or constitutional law of North Carolina which requires an interstate carrier having lines in and through that State to engage in intrastate commerce unless it desires to do so. If it does voluntarily undertake such intrastate business it is required not to discriminate; it must receive for shipment from one shipper all freight tendered of the kind and nature it is already receiving from others. But it is perfectly possible under North Carolina law that an interstate carrier have a line of railroad running into or through that State, use that line only for interstate business, and refuse even to engage in any intrastate business whatsoever.

It results that if an interstate carrier voluntarily engages in such intrastate commerce it is exercising a privilege within the power of that State to tax, as this court has frequently held, and the franchise or privilege tax upon this privilege, being competently measured so as not to burden interstate commerce, is within the power of the State and is valid.

V.

There is no merit in the contention that the franchise or privilege tax of the Southern, the Atlantic and Yadkin, the Seaboard, and the Atlantic Coast Line should be calculated according to Section 82 (3½) of the Revenue Act.

The plaintiffs contend finally that even if the franchise or privilege tax is within the power of the State to impose and is valid, it should nevertheless be calculated according to the rule of Section 82 (3½) of the Revenue Act. (See Appendix D.)

They contend, therefore, that whenever the report of a domestic railroad shows capital stock issued and outstanding, or the report of a foreign railroad shows the proportion of its capital stock apportionable to North Carolina, to be less than one-half of the assessed value of the property in the State, then the franchise or privilege tax on such railroad should be calculated with reference to one-half, instead of the whole, of the assessed value of the property of such railroad in the State.

And the Southern, the Seaboard, the Atlantic and Yadkin, and the Atlantic Coast Line all contend that their re-

spective reports show the proportion of their capital stock apportionable to North Carolina (all capital stock in the case of the A. & Y., a wholly intrastate carrier) to be less than one-half the assessed value of their property in the State, and that in each case, therefore, their franchise or privilege tax should be calculated as one-tenth of one per cent of one-half, instead of the whole, of the assessed value of their property in the State and that so calculated their correct franchise or privilege tax would be exactly one-half the tax which has been actually assessed against them.

The Norfolk Southern, on the other hand, contends that its proportion of capital stock apportionable to North Carolina is more than one-half the assessed value of its property in the State, that under Section 82 (3½) therefore its franchise or privilege tax is to be calculated as one-tenth of one per cent of its entire *ad valorem* assessment in the State, while the same taxes of the other plaintiffs are required by the statute to be calculated on only the half of their respective property assessments. It contends, therefore, that this distinction is arbitrary and makes the franchise or privilege tax statute invalid for discrimination. (Norfolk Southern Record, pp. 16-17.)

The defendants contend that Section 82 (3½) has no application and has never had application to any railroads whatsoever; that it applies only to the franchise taxes on ordinary corporations, foreign and domestic, imposed by Section 82 (1, 2, 3, 4, 5, 6, 7, 8, and 9), which taxes are measured by capital stock, not by property value in the State as in the case of railroads; that the franchise tax on all railroads is measured by one-tenth of one per cent of the total assessed value of property in the State, without any reference

to capital stock as a measure; that it is imposed on all railroads alike and has been correctly measured as to each of the plaintiffs without discrimination and on exactly the same basis.

It is worthy of note that four of the plaintiffs contend that they are injured and that their taxes are incorrectly calculated because not calculated according to Section 82 (3½) and that the fifth plaintiff contends that this very sub-section is arbitrary, contains an unreasonable classification and is discriminatory against it and therefore invalid under the State constitution and the Fourteenth Amendment.

This is a mere question of the construction of a State statute. A certain construction has been placed upon it by the taxing authorities of the State, by the officers of the State, and by the Attorney General of the State, in their answers in these suits. They hold that the subsection does not apply, and was never intended to apply, to railroads. This is not a constitutional question; it is not a question going to the real merits of these controversies. It is a question of State law, upon which a decision of the State Supreme Court will bind the Federal Courts. It is such a question as this Court will be extremely hesitant to decide, in the absence of a State precedent, and such a question as this Court will not notice, other material questions arising in these suits being decided in favor of the defendants.

The history of this subsection shows clearly that it has no application to railroads. Section 82 (3½) was first enacted in 1920 (Public Laws 1920, ch. 1). In that statute, in which it was first enacted, it reads: "where a report required to be made by Section 82 of Chapter 90 of the Public Laws of 1919" shows the capital stock to be less than one-half of

the assessed value of the property in or apportionable to North Carolina, then this subsection should be operative. In other words, as enacted, it applied only to corporations required to make reports under Section 82 of the Revenue Act of 1919. (Appendix A, and Appendix C, Sec. 7*b*.)

In the Revenue Act of 1919, Section 82, as we have already seen in our previous discussion of the history of the legislation, railroads were not included and were not required to make reports. The only privilege or franchise tax on railroads was imposed by Sections 77 and 78. Railroads were not required to make reports under Section 82 of the Revenue Act of 1919. In that act, Section 82 (9) specifically excluded "railroads" from the operation of any of the subsections of Section 82.

It was only in the Act of 1920 that the privilege tax on railroads was rewritten and shifted to its present position as a subsection of Section 82. The same act struck the word "railroads" out of the provision of Section 82 (9), which had expressly excluded railroads from the operation of Section 82, in order that the new Section 82 (6½) might have application. In the same statute (1920) the Legislature enacted subsection 3½ under the heading of the general franchise tax applicable to corporations in general calling it subsection 7*b*. It was not intended, however, to make it applicable to any case except "where a report" was "required to be made by Section 82" of the Revenue Act of 1919, and railroads were not within that section.

In bringing over this subsection 7*b* from the Act of 1920, in which it was first enacted, into the Act of 1921, where it now stands as 82 (3½), a purely mechanical and apparently unintentional change in the wording was made, so that it

read "where a report required to be made under the provisions of *this section,*" instead of "by Section 82 of Chapter 90 of the Public Laws of 1919." The position of this subsection under the heading Domestic Corporations, the wording as it was first enacted showing clearly that it had no application to railroads, and the fact that Section 82 (6½) is an interpolation made in Section 82 at the same time that 82 (3½) was interpolated, all prove that the redrafting of the Section 82, with its new interpolations (3½) and (6½) written into it, was not intended to change its and their meaning and application.

Any doubt as to this is foreclosed when we consider that Section 82 (3½), by its very terms, applies only to corporations whose privilege tax is measured by capital stock. Capital stock has nothing to do with the admeasurement of the privilege tax on railroads, and therefore it is logically impossible that Section 82 (3½) could apply to them. It applies to the corporations within the terms of subsections (1) to (6), the privilege or franchise tax upon which is measured by capital stock.

It is furthermore persuasive, and we think conclusive, that the Legislature never intended Section 82 (3½) to apply to railroads; that after this contention of the plaintiffs was made for the first time in the present suits the extra session of the General Assembly which met in December, 1921, a month or so after the bringing of these suits, removed Section 82 (6½) from its context as a subsection under Section 82, restored it to its former position as Section 78 of the Revenue Act, and left the Section 82 (3½) in its same place as a subsection under Section 82 and plainly having no application whatever to the franchise tax on railroads imposed by this new Section 78 (Appendix A).

We do not contend that this act of the special session enacted after the bringing of these suits had a retroactive effect to change the Revenue Act passed in the regular session earlier in the year 1921, but that it was declaratory of the legislative intention never to have made Section 82 (3½) applicable to railroad franchise or privilege taxes as surely as if the Supreme Court of the State had declared such to have been the intention.

We repeat that this is a question of construction of a State statute. Every intendment must be taken in favor of a construction which will render it valid. It is not a constitutional question. It is not a question of which the Federal courts would have any jurisdiction, aside from other matters giving them jurisdiction of these suits. If this court should hold that Section 82 (3½) applied to the franchise tax on railroads, in spite of the administrative and legislative interpretation in the State to the contrary, the State Supreme Court might decide the question differently and this court would be bound by the decision of the State court.

And we believe this court will be cautious about reversing the district courts in these cases and holding that the injunctions should have been granted to restrain collection of the franchise taxes, constitutional objections having failed, on the mere ground that this court might be of the opinion that the construction of its own statutes made by the State is incorrect and that the franchise taxes, although not unconstitutional, are incorrectly calculated.

But we think we have shown affirmatively that they have been correctly calculated and that there is no merit in the contention of the plaintiffs to the contrary.

Conclusion.

Pending the decision of this court upon these appeals a very considerable amount of the revenues for the support of the State government and of the revenues for the support of local subdivisions of North Carolina is withheld.

Although the district courts denied the interlocutory injunctions upon the pleadings and proofs they granted a stay pending these appeals which has had the effect to prevent the collection from the plaintiff railroads for the year 1921 of any part of the taxes in litigation.

The total of franchise taxes due by the plaintiffs under the North Carolina statutes amounts to $209,000 in round numbers. This is the total tax contribution of all the plaintiff railroads to the support of the State government except income taxation and not one cent of it has been paid or will be paid until these appeals are decided.

The total valuation for *ad valorem* taxes of all the property of the five plaintiffs is $209,187,576. These valuations under the system in force in North Carolina are the basis for all property taxes, the revenues from which go to the support of the counties, cities, towns, and local tax districts through which the lines of the plaintiffs run.

Of this total of $209,187,576 the plaintiffs have admitted the validity only of a total valuation of $141,740,535 and property taxes in North Carolina have been paid for 1921 by the five plaintiffs only on the admitted valuation. This leaves property taxes at the prevailing rates upon property assessed for taxation at $67,447,040 unpaid and their collection prevented pending these appeals.

We invite attention to these facts in order to show the importance of these suits to the State of North Carolina and to suggest what a large amount of that State's tax revenues are held up thereby.

In addition each of the five plaintiffs has brought a similar suit in the district court to restrain the collection of all income taxes, which under the system prevailing also go to the support of the State government.

And in addition to all these suits for the year 1921 each of the plaintiffs has now brought a similar suit to contest the validity and prevent the collection of all franchise taxes and of all property taxes on more than the admitted assessments for the year 1922.

These large amounts of the revenues of North Carolina are withheld upon allegations principally of unconstitutionality of the State's tax laws under provisions of the State and Federal Constitutions.

It is a well-settled rule of law in North Carolina, as also of this court, that courts will indulge every presumption in favor of the validity of a statute and will not declare it unconstitutional until it is made clearly to appear, beyond every reasonable doubt, that it is repugnant to the organic law.

State v. ——, 2 N. C., 28;
Trustees v. Foy, 5 N. C., 58;
Bank v. Taylor, 6 N. C., 266;
Neal v. Roberts, 18 N. C., 81;
McGwigan v. Wilmington, etc., R., 95 N. C., 428;
Phelps v. Chesson, 34 N. C., 194, 198;
Jacobs v. Smallwood, 63 N. C., 112;
N. C. Railroad Co. v. Commissioners, 82 N. C., 260;

Holton v. Board, 93 N. C., 430;
State v. Moore, 104 N. C., 714;
Green v. Owen, 125 N. C., 212, 222;
Lowery v. School Trustees, 140 N. C., 33;
State v. Williams, 146 N. C., 618;
Stephens v. Hicks, 156 N. C., 239, 245;
Whitford v. Board, 159 N. C., 160;
Luther v. Commissioners, 164 N. C., 241;
Smith v. Wilkins, 164 N. C., 135;
King v. Wilmington, etc., R., 66 N. C., 277.

It was said by Dick, J., in the case of *King v. Wilmington, etc., R., supra:*

> "The power of the courts to declare statutes unconstitutional is a high prerogative, and ought to be exercised with great caution, and they should not declare a statute void unless the nullity and invalidity of the act are placed in their judgment beyond a reasonable doubt. A reasonable doubt must be solved in favor of the legislative action and the act be sustained."

And it is a further well-settled rule of the North Carolina courts that a statute should not be held invalid if it can be so construed as to make it valid.

State v. Poole, 74 N. C., 412;
Harrison v. Styres, 74 N. C., 290;
Lowery v. Trustees, 140 N. C., 33;
Bonitz v. Board, 154 N. C., 375.

These settled rules of the North Carolina Supreme Court govern the decision by this court of all questions of constitutionality under the State Constitution.

Since this is a Federal tribunal, and the State courts have not passed upon the questions of constitutionality under the State Constitution raised in these suits, there is an additional well-settled principle governing this court in passing upon those questions. It is that the Federal courts will be very reluctant to declare a State statute violative of the State Constitution before that question has been considered by the State courts, and that this reluctance is particularly strong where the statute is a tax statute.

Coulter v. Louisville, etc., R. Co., 196 U. S., 599, 609;
Michigan Central R. Co. v. Powers, 201 U. S., 245;
Otis Co. v. Ludlow Mfg. Co., 201 U. S., 140.

In the *Michigan Central R. Case, supra*, it was said by this court, Mr. Justice Brewer writing the opinion:

> "Undoubtedly, a Federal court has the jurisdiction, and when the question is properly presented it may often become its duty to pass upon alleged conflict between a statute and a State constitution, even before the question has been considered by the State tribunals. All objections to the validity of the act, whether springing out of the State or of the Federal Constitution, may be presented in a single suit and call for consideration and determination. At the same time, the Federal courts will be reluctant to adjudge a State statute to be in conflict with the State Constitution before that question has been considered by the State tribunals. *Especially is this true when the statute is one affecting the revenues of the State and therefore of public interest.*"

That the same rule as to the presumption of constitutionality under the Federal Constitution obtains, and that a State

taxing statute must be shown to be utterly repugnant to the Federal Constitution before it may be held unconstitutional for such repugnance, is sufficiently shown by quotation of the following passage from the opinion of this court in the case of *Henderson Bridge Co. v. Henderson,* 173 U. S., 592, at 614:

> "But in order to bring taxation imposed by a State, or under its authority, within the scope of the Fourteenth Amendment of the National Constitution, the case should be so clearly and palpably an illegal encroachment upon private rights as to leave no doubt that such taxation by its necessary operation is really spoliation under the guise of exerting the power to tax. As an act of Congress should not be declared unconstitutional unless its repugnancy to the supreme law of the land is too clear to admit of dispute, so a local regulation under which taxes are imposed should not be held by the courts of the Union to be inconsistent with the National Constitution unless that conclusion be unavoidable. All doubt as to validity of legislative enactments must be resolved, if possible, in favor of the binding force of such enactments."

The holding of this case in this regard was specifically reaffirmed and applied in the very recent case of *Dane v. Jackson,* 256 U. S., 589.

We respectfully submit that under these and the other authorities which we have cited throughout this brief the plaintiffs in these suits have made no such showing of unconstitutionality or illegality of the taxes sought to be restrained as would justify the Federal courts in so declaring them and in staying the arm of the State of North Carolina in its most essential power of raising revenue.

On the other hand we think we have affirmatively shown that each of the taxes here sought to be restrained is constitutional, legal, and valid, and that the decree of the district courts ought to be affirmed, and the State of North Carolina allowed to proceed with the collection of needed taxes from the plaintiff corporations.

Respectfully submitted,

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APPENDIX A.

Extracts from Chapter 90, Laws 1919, Being the Revenue Act of 1919.

"SEC. 3. *Rate.*

There shall be levied and collected annually an *ad valorem* tax of eleven and two-thirds cents for State purposes, four cents for pensions and thirty-two cents for public schools, making forty-seven and two-thirds cents on every one hundred dollars value of real and personal property in this State required to be listed in 'An Act to provide for the assessment of property and collection of taxes,' (the Machinery Act) subject to exemption made by law."

* * *

"SCHEDULE C.

"SEC. 76. *Defining taxes embraced in this schedule.*

The taxes embraced in this schedule shall be listed and paid as specially herein provided, and shall be for the privilege of carrying on the business of doing the act named; and, if a corporation, shall be a tax for the continuance of its corporate rights and privileges given under its charter, if incorporated in this State, or by reason of any act of domestication, if incorporated in another State, and shall be subject to other regulations mentioned in section twenty-six under Schedule B."

SEC. 77. *Privilege tax on railroads.*

Every steam railroad company and every person or agency operating a steam railroad in this State shall, on or before the thirtieth day of July in each year, make and return to the State Auditor, in such form and upon such blanks as shall be furnished by him, a true statement of the gross earnings of their respective roads for the preceding year ending the thirtieth day of June; of the number of miles of road operated by each such company or person, and the number of miles in the State, and the gross earnings per mile per annum during such year; which statement shall be verified by the oath of the secretary and treasurer of such companies, or of the person so operating such railroad, the State Auditor shall certify said amount to the State Treasurer.

SEC. 78. *Rate of taxation.*

The annual license tax for operating such railroads within the State shall be as follows: When gross earnings per mile are one thousand dollars or less per year, a tax of two dollars per mile; when gross earnings per mile exceed one thousand dollars per year but do not exceed two thousand dollars, a tax of four dollars per mile; when gross earnings per mile exceed two thousand dollars per year, but do not exceed three thousand, a tax of six dollars per mile; when gross earnings per mile are in excess of three thousand dollars per year and not over five thousand dollars per year, a tax of eight dollars per mile; when gross earnings exceed five thousand dollars per mile per year, a tax of ten dollars per mile. The tax imposed by this section shall be paid to the State Treasurer at the time of making the report provided in section seventy-seven. No county, city, or town shall be allowed to collect any tax under this section.

SEC. 79. *Privilege tax on express companies.*
(Practically as in Revenue Act of 1921.)
* * *

SEC. 79a. *Rate of taxation.* (On Express Companies.)
* * *

SEC. 80. *Telegraph companies.*
(As in Revenue Act of 1921, except tax two dollars instead of five per mile.)
* * *

SEC. 81. *Telephone companies.*
(As in Revenue Act of 1921, except two and one half per cent instead of three per cent of gross receipt from intrastate commerce.)
* * *

SEC. 82. *Franchise tax on corporations.*
(Subsections 1, 2, 3, 4, 5, 6, 7, and 8, as in Revenue Act of 1921, except tax of one-twenty-fifth of one per cent instead of one-tenth. No subsection 3½ nor 6½.)
Subsection 9 as in Revenue Act of 1921 except including the word "railroad" in its exception.

APPENDIX B.

Extracts from the Revaluation Act, Chapter 84, Laws of 1919.

An Act to Provide for the Listing and Valuing of All Property, Real, Personal and Mixed, at Its Real Value in Money.

The General Assembly of North Carolina do enact:

SECTION 1. That chapter two hundred and thirty-four of the Public Laws of one thousand nine hundred and seventeen, entitled "An act to amend chapter two hundred and eighty-six of the Public Laws of one thousand nine hundred and fifteen, in relation to the assessment of property and the collection of taxes," be continued in full force and effect for the listing and valuing of all property for the year one thousand nine hundred and nineteen, and that the said act shall continue in full force and effect, except in so far as the said act may be revised and amended by this session of the General Assembly, and except in so far as it may be in conflict with the provisions of this act, and in all such cases where there may be such conflict the provisions of this act shall govern: *Provided*, the valuations lawfully fixed on real property in the year one thousand nine hundred and fifteen, except where such valuations have been or may be in the year one thousand nine hundred and nineteen changed on account of structures erected or destroyed since the valuation of one thousand nine hundred and fifteen, or otherwise changed according to law, shall remain the valuation of such real property for the year one thousand nine hundred and nineteen.

SEC. 2. That for the purpose of making a complete list of all the property of every citizen of the State, real, personal and mixed, and of having all of such property valued in accordance with the rule laid down in the Constitution of the State at its true value in money, and to be adopted and used as the basis of all taxes levied by the State, counties, cities, towns and other taxing districts of the State for the year one thousand nine hundred and twenty, the machinery hereinafter set out is provided.

TAX RATES.

SEC. 3. The assessment made under the provisions of this act shall not be used as the basis for computation of taxes unless and until the same has been approved by the General Assembly and until the

tax rates levied by the State have been revised by the General Assembly, and the tax rates levied by the counties, cities, towns and special tax districts of the State have been revised under rules to be laid down by the General Assembly, and such rates shall in all cases be so adjusted that an increase in revenue from the general property tax of not more than ten per cent shall be levied and collected in the year one thousand nine hundred and twenty than was levied and collected in the year one thousand nine hundred and nineteen in the State, and in all counties, cities, towns and special tax districts in the State. The rates so levied in one thousand nine hundred and twenty shall in all cases become the maximum rates that can be levied by the counties, cities, towns and special tax districts in any year thereafter until authority is given by the General Assembly to increase them: *Provided*, that fractions of cents may be disregarded in fixing the final modified rate of tax by the State, counties, municipalities and all other tax districts.

SEC. 4. *How property shall be valued.*

All property, real, personal and mixed, shall be valued from best information obtainable according to its true value in money; that is to say at the price for which such property would sell for cash if voluntarily offered for sale by the owner thereof, and not at the price which might be realized if such property were sold at forced sale. In determining the value, the assessor shall consider as to each price of property its advantage of location, buildings or other improvements, quality of soil, quantity of standing timber, water privileges, water-power, mines, minerals, quarries, or other valuable deposits known to be available therein, and their value.

* * * * * * *

SEC. 7. *Organization for revaluation.*

The organization for making the revaluation provided for in this act shall be:

The State Tax Commission as provided for in chapter two hundred and thirty-four of the Public Laws of one thousand nine hundred and seventeen.

A district supervisor for each of ten districts, the formation of the districts to be arranged by the State Tax Commission.

A county supervisor for each county.

One clerk or assistant supervisor for each county having total taxable values for the year one thousand nine hundred and eighteen of five million dollars, and one additional clerk as assistant supervisor for each additional five million dollars, and as many others as may be approved by the Board of County Commissioners.

A county board of appraisers and review, of which the county supervisor shall be chairman, and two other members to be appointed as hereinafter provided.

* * * * * * *

SEC. 25. *When to be completed.*

The listing and revaluation of all real and personal property herein provided for shall be completed in each county not later than the first day of May, in one thousand nine hundred and twenty, and each year thereafter, and complete abstracts of such lists, by townships, and in such forms as the State Tax Commission shall prescribe, shall be mailed to the State Commission by the county supervisor not later than the fifteenth day of May, one thousand nine hundred and twenty, and each year thereafter.

SEC. 26. *Equalization or revaluation.*

The State Tax Commission shall have the authority as a State Board of Equalization given in chapter two hundred and thirty-four of the Public Laws of one thousand nine hundred and seventeen, and it shall have authority to make such investigation, through its district supervisors, county supervisors or special examiners as may be necessary to determine if the list returned for each county is a complete list, and if the valuations returned have been made as required by this act. If property is found that has not been returned it shall order such property placed on the list, and if it is found that the property in any county had been valued either higher or lower than required by this act it may order a revaluation in such county, or require by general order that a percentage increase or decrease be made for the year in which such order is made, but shall in that case order a complete revaluation of all such property at some time during the next ensuing year, to the end that any possible injustice that may have been done by the percentage increase or decrease may not be continued. If it is found necessary to order a revaluation in any county the State Tax Commission shall designate both the county supervisors and the county board of appraisers and review, by whom the reassessment shall be made, and the expense of such revaluation shall be borne by the county, and is hereby declared to be a necessary expense of such county.

* * * * * * *

SEC. 31. *Railroads, telegraph, telephone, street railway companies.*

As of the first day of May, one thousand nine hundred and nineteen, the State Tax Commission shall make a complete revaluation of the property of all railroad, telegraph, telephone and street railway companies, to be used as the basis for computing taxes for such companies for the years one thousand nine hundred and twenty, one thousand nine hundred and twenty-one, one thousand nine hundred and twenty-two and one thousand nine hundred and twenty-three, such revaluation to be made in accordance with the general rule and intent and purpose of this act as to all other property. The commission shall have the right to require all information required by chapter two hundred and thirty-four of the Public Laws of one thousand nine hundred and seventeen to be furnished by such companies, and also a sworn estimate, by a responsible officer of every such company of the cost of reproduction of the properties of such companies new, including side-tracks, double-tracks, and all property owned by such companies in this State, less reasonable depreciation for such of its properties as have depreciated in value, and shall also include the present value of all real estate used as rights of way, including depot sites, yards, terminals and otherwise. All properties of this class that have been operated by the United States Government shall report the earnings during such period of operation and also the compensation paid, or agreed to be paid, for their use, and if no agreement has been made, the amount of compensation asked for by the owners.

APPENDIX C.

Extracts from the Act of the Special Session of 1920 Approving and Adopting as the Basis for Taxation the Revaluations Made Under the Revaluation Act.

Chapter 1, *Laws Extra Session*, 1920.

An Act to Revise and Limit Tax Rates for the Year 1920 *in Compliance With Provisions of the Revaluation Act; to Provide Additional Revenue for the State From Franchise and License Taxes, and for Other Purposes.*

The General Assembly of North Carolina do enact:

SECTION 1. That the assessment or valuation of property made under the provisions of chapter eighty-four of the Public Laws of

one thousand nine hundred and nineteen is hereby approved by the General Assembly and adopted as the basis for the levy of tax rates by the State and by all subdivisions of the State for which taxes are levied for the year one thousand nine hundred and twenty, and the valuation of real property so fixed shall be adopted for the years one thousand nine hundred and twenty-one, one thousand nine hundred and twenty-two, and one thousand nine hundred and twenty-three, except as such valuations may be hereafter changed according to law.

SEC. 2. That section two of chapter ninety of the Public Laws of one thousand nine hundred and nineteen entitled "An Act to Raise Revenue" be repealed and the following substituted for section two of that act:

"SECTION 2. Poll and property tax.

"That no tax on property or polls shall be levied for the year one thousand nine hundred and twenty for the use of the State or for the State pension fund. There shall be levied and collected for the year one thousand nine hundred and twenty for the benefit of the State public school fund an ad valorem tax of thirteen cents on every one hundred dollars value of real and personal property in this State required to be listed by the revenue laws of the State and on each taxable poll or male between the ages of twenty-one and fifty years, except the poor or infirm whom the county commissioners may declare and record fit subjects for exemption, there shall be levied and collected for the year one thousand nine hundred and twenty a tax of thirty-nine cents."

SEC. 3. That section three of chapter ninety of the Public Laws of one thousand nine hundred and nineteen be repealed and designated as "obsolete."

SEC. 4. That the taxes levied in the foregoing section two shall be collected and paid into the State Treasury for the benefit of the public school fund in the manner provided by law for the collection and settlement of State taxes.

* * * * * * *

SEC. 7*a*. Franchise tax on corporations.

That the franchise tax provided in section eighty-two of chapter ninety of the Public Laws of one thousand nine hundred and nineteen be amended by striking out of section eighty-two (3) and of section eighty-two (8) the words "one twenty-fifth of one per cent" where they appear in said sections, and substituting in lieu

thereof the words "one-tenth of one per cent," and by striking out of line twelve of section eighty-two (3) and of line ten of section eighty-two (8) the word "five" and inserting in lieu thereof the word "ten."

SEC. 7b. That where a report required to be made by section eighty-two of chapter ninety of the Public Laws of one thousand nine hundred and nineteen to the State Tax Commission by any domestic corporation shows capital stock issued and outstanding by any such company to be less than one-half of the assessed value for taxation of all the property of such company in this State for the year one thousand nine hundred and twenty, or the report of any foreign corporation shows the proportion of the capital stock of such foreign corporation apportionable to this State under the rules laid down in section eighty-two of the Revenue Act to be less than half of the assessed value for taxation of all the property of such company in this State for the year one thousand nine hundred and twenty, the measure of the extent to which the corporate franchise of any such corporation is being used and the amount of franchise tax to be paid by any such corporation shall be calculated with reference to the sum of one-half of the total assessed value of all the property of such corporation for the year one thousand nine hundred and twenty in this State.

* * * * * * *

SEC. 7d. Privilege or franchise tax on railroads.

That sections seventy-seven and seventy-eight of chapter ninety of the Public Laws of one thousand nine hundred and nineteen be repealed and that section eighty-two (9) of chapter ninety of the Public Laws of one thousand nine hundred and nineteen be amended by striking out the third line of the said subsection the word "railroad"; that section eighty-two of chapter ninety of the Public Laws of one thousand nine hundred and nineteen be amended by inserting a new subsection to be designated as section eighty-two (6½) as follows:

SECTION 82 (6½)—Railroads. Every railroad company doing business in this State shall on or before the first day of October, one thousand nine hundred and twenty, and on or before the thirtieth day of July annually thereafter, make and return to the State Tax Commission, in such form and upon such blanks as shall be furnished by the State Tax Commission, and giving such information as the State Tax Commission shall require, for the purpose of carrying out the provisions of this section, and upon which

report the State Tax Commission shall ascertain and certify to the State auditor the value upon which the amount of taxes which shall be paid by any such railroad company as a franchise or privilege tax shall be calculated. The basis upon which such calculation shall be made by the State Tax Commission and the extent to which every such railroad company is exercising its franchise in this State shall be found to be the value of the property, tangible and intangible, of each such railroad company in the State assessed for the year in which such report is made for ad valorem taxes. The franchise tax of each such railroad company for the privilege of exercising its franchise in this State shall be one-tenth of one (0.1%) per cent of the value so ascertained by the State Tax Commission, and such tax shall be due and payable on or before the fifteenth day of October in each year. If any such company shall fail to make the report provided for on or before the first day of October, one thousand nine hundred and twenty, it shall be the duty of the State Tax Commission to make an approximation from the reports and records on file in that department of the amount of taxes due under this section, and certify same to the State auditor and treasurer for collection. No county, city or town shall be allowed to collect any taxes under this section. The tax imposed by this section shall be in addition to the tax imposed by section seventy-eight of chapter ninety of the Public Laws of one thousand nine hundred and nineteen, prior to the ratification of this act, only in so far as the tax imposed by this section exceeds the tax imposed by section seventy-eight of chapter ninety of the Public Laws of one thousand nine hundred and nineteen, and if the tax imposed by section seventy-eight of chapter ninety of the Public Laws of one thousand nine hundred and nineteen for the year one thousand nine hundred and twenty have been paid by any railroad company such amount so paid shall be credited on the tax imposed by this section.

There follow sections changing the rates of the privilege taxes on express companies, telegraph companies, telephone companies, and chair and sleeping cars, from those provided in the Revenue Act of 1919 to those provided in Revenue Act of 1921, Appendix D.

APPENDIX D.

Extracts from the Revenue Act of 1921, With Quotations of Titles from Schedules B and C Showing the Variety of Privilege, License, Occupation, and Excise Taxes Other Than Corporation Franchise Taxes Imposed by North Carolina.

An Act to Raise Revenue.

The General Assembly of North Carolina do enact:

SCHEDULE A.

SECTION 1. *Taxes payable in national currency.*

The taxes hereinafter designated are payable in the existing national currency, and except as otherwise provided shall be for the calendar year in which they become due.

SEC. 2. *Poll tax.*

There shall be levied by the board of county commissioners in each county a tax of two dollars on each taxable poll or male between the ages of twenty-one and fifty years, except the poor and infirm, whom the county commissioners may declare and record fit subjects for exemption. The taxes levied and collected under this section shall be for the benefit of the public school fund of the county, and for the support of the poor, but not more than twenty-five per cent of the tax may be used for the latter purpose.

SEC. 3. *State taxes.*

No tax on any property in the State shall be levied for any of the uses of the State government. The taxes hereinafter levied in this act are for the expenses of the State government, the appropriations to its educational, charitable, and penal institutions, pensions for Confederate soldiers and widows, the interest on the debt of the State, an equalizing fund for public schools, and other specific appropriations made by law, and shall be collected and paid into the general fund of the State treasurer.

* * * * * * *

Inheritance Tax.

SCHEDULE AA.

* * * * * * *

SCHEDULE B.

SEC. 26. *Defining taxes under this schedule.*

Taxes in this schedule shall be imposed as license tax for the privilege of carrying on the business or doing the act named, and nothing in this act contained shall be construed to relieve any person or corporation from the payment of tax as required in the preceding schedule. The license issued under this schedule shall be for twelve months and shall expire on the thirty-first day of May of each year. Such license thus obtained shall be a personal privilege, and shall not be transferable nor any abatement in the tax allowed; and unless otherwise provided in the section levying the tax, the tax levied for the use and benefit of the State shall be collected in each county in which the business is conducted, except as otherwise herein provided. Whenever in this act a tax is graduated with reference to the population of the city or town in which the privilege is exercised, the minimum tax provided in such section shall be applied to the same business or privilege when conducted or exercised outside of a municipality.

SEC. 27. *Theaters.*
* * *

SEC. 28. *Traveling theatrical companies.*
* * *

SEC. 29. *Circuses, menageries, wild west, dog and pony shows, etc.*
* * *

SEC. 31. *Attorneys, physicians, dentists, etc.*
* * *

SEC. 32. *Real estate and rent-collecting agents.*
* * *

SEC. 32*a*. *Real estate auction sales.*
* * *

SEC. 33. *Coal dealers.*
* * *

SEC. 34. *Collecting agencies.*
* * *

SEC. 34a. *Dealers in second-hand clothing.*

* * *

SEC. 34b. *Undertakers and embalmers, and retail dealers in coffins.*

* * *

SEC. 35. *Dealers in horses and mules.*

* * *

SEC. 36. *Phrenologists.*

* * *

SEC. 37. *Bicycle dealers.*

* * *

SEC. 38. *Commission merchants and persons selling stock in foreign corporations.*

* * *

SEC. 39. *Ship brokers.*

* * *

SEC. 40. *Pawnbrokers.*

* * *

SEC. 41. *Livery stables.*

* * *

SEC. 42. *Sewing machines.*

* * *

SEC. 43. *Feather renovators.*

* * *

SEC. 44. *Peddlers.*

* * *

SEC. 45. *Mercantile agencies.*

* * *

SEC. 46. *Gypsies or fortune-tellers.*

* * *

SEC. 47. *Lightning rod agents.*

* * *

SEC. 48. *Hotels.*

* * *

SEC. 48a. *Restaurants, etc.*

* * *

SEC. 49. *Cotton compresses.*
* * *

SEC. 50. *Billiard and pool tables, and bowling alleys.*
* * *

SEC. 51. *Gift enterprises; prize photographs.*
* * *

SEC. 52. *Slot machines.*
* * *

SEC. 53. *Bagatelle tables, etc.*
* * *

SEC. 54. *Stockbrokers.*
* * *

SEC. 55. *Bottling works.*
* * *

SEC. 56. *Packing houses.*
* * *

SEC. 57. *Newspaper contests.*
* * *

SEC. 58. *Persons, firms, or corporations selling certain oils.*
* * *

SEC. 59. *Automobiles for hire.*
* * *

SEC. 60. *Building and loan associations.*
* * *

SEC. 61. *Pressing clubs.*
* * *

SEC. 61*a*. *Shoe shine stands.*
* * *

SEC. 62. *Tobacco warehouses.*
* * *

SEC. 63. *Newsdealers on trains.*
* * *

SEC. 64. *Soda fountains and venders of carbonated drinks.*
* * *

SEC. 65. *Dealers in patent rights and formulas.*
* * *

SEC. 66. *Stallions and jacks.*
* * *

SEC. 67. *Insurance companies.*
* * *

SEC. 67a. *Morris Plan companies.*
* * *

SEC. 68. *Dealers in cap pistols, fireworks, etc.*
* * *

SEC. 69. *Pianos and organs.*
* * *

SEC. 70. *Cigarette and cigar dealers and manufacturers of cigarettes and cigars.*
* * *

SEC. 71. *Laundries.*
* * *

SEC. 71a. *Garages.*
* * *

SEC. 72. *Manufacturers of automobiles.*
* * *

SEC. 73. *Emigrant agents.*
* * *

SEC. 74. *Plumbers, steam and gas pipe fitters.*
* * *

SEC. 75. *Trading stamps.*
* * *

SCHEDULE C.

SEC. 76. *Defining taxes embraced in this chedule.*

The taxes embraced in this schedule shall be listed and paid as specially herein provided, and shall be for the privilege of carrying on the business or doing the act named; and, if a corporation, shall be a tax for the continuance of its corporate rights and privileges given under its charter, if incorporated in this State; or by reason of

any act of domestication, if incorporated in another State, and shall be subject to other regulations mentioned in section twenty-six under Schedule B.

SEC. 77. *Privilege tax on chair and sleeping cars.*
* * *

SEC. 78. *Obsolete.*
* * *

SEC. 79. *Privilege tax on express companies.*
* * *

SEC. 79a. *Rate of taxation* (on express companies).
* * *

SEC. 80. *Telegraph companies.*
* * *

SEC. 81. *Telephone companies.*
* * *

SEC. 82. *Franchise tax on corporations.*

Domestic corporations. Between the first day of May and the first day of July, one thousand nine hundred and thirteen, and annually thereafter during the month of May, each corporation organized under the laws of this State shall make a report in writing to the State Tax Commission in such form as the commission may prescribe.

SEC. 82. (1). Such report shall be signed and sworn to before an officer authorized to administer oaths, by the president, vice-president, secretary, or general manager of the corporation, and forwarded to the Commission.

SEC. 82 (2). Such report shall contain—

(a) The name of the corporation.

(b) The location of its principal office.

(c) The name of the president, secretary, treasurer, and members of the board of directors, with postoffice addresses of each.

(d) The date of the annual election of officers.

(e) The amount of authorized capital stock and the par value of each share.

(f) The amount of capital stock subscribed, the amount of capital stock issued and outstanding, and the amount of capital stock paid up.

(g) The nature and kind of business in which the corporation is engaged, and its place or places of business.

(h) The change or changes, if any, in the above particulars made since the last annual report.

SEC. 82 (3). Upon the filing of the report provided for in the last three preceding subsections, the Commission, after finding such report to be correct, shall, on or before the first Monday of August, determine the amount of the subscribed or issued and outstanding capital stock of each such corporation. On the first Monday in August, or as soon thereafter as practicable, the Commission shall certify the amount so determined by it to the Auditor of the State, who shall charge for collection on or about August fifteenth, as herein provided, from such corporation, a fee of one-tenth of one per cent upon its subscribed or issued and outstanding capital stock, which fee shall not be less than ten dollars in any case. Such fee shall be payable to the Treasurer of the State on or before the first day of the following October. No county, city, or town shall have the power to levy any franchise tax under this section.

SEC. 82 (3½). That where a report required to be made under the provisions of this section to the State Tax Commission by any domestic corporation shows capital stock issued and outstanding by any such company to be less than one-half of the assessed value for taxation of all the property of such company in this State for the year in which report is made, or the report of any foreign corporation shows the proportion of the capital stock of such foreign corporation apportionable to this State under the rules laid down in section 82 of this act to be less than one-half of the assessed value for taxation of all the property of such company in this State for the year in which such report is made, the measure of the extent to which the corporate franchise of any such corporation is being used and the amount of franchise tax to be paid by any such corporation shall be calculated with reference to the sum of one-half of the total assessed value of all the property of such corporation in this State.

SEC. 82 (4). *Foreign corporations.* Annually during the month of July, each foreign corporation doing business in this State, and owning or using a part of all of its capital or plant in this State, and subject to compliance with all other provisions of law, and in addition to all other statements required by law, shall make a report in writing to the commission in such form as the commission may prescribe.

SEC. 82 (5). Such report shall be signed and sworn to before an officer authorized to administer oaths, by the president, vice president, secretary, superintendent, or managing agent in this State and forwarded to the Commission.

SEC. 82 (6). Such report shall contain—

(*a*) The name of the corporation and under the laws of what State or county organized.

(*b*) The location of its principal office.

(*c*) The names of the president, secretary, treasurer, and members of the board of directors, with the post office address of each.

(*d*) The date of the annual election of officers.

(*e*) The amount of authorized capital stock, and the par value of each share.

(*f*) The amount of capital stock subscribed, the amount of capital stock issued, and the amount of capital stock paid up.

(*g*) The nature and kind of business in which the company is engaged, and its place or places of business, both within and without the State.

(*h*) The name and location of its office or offices in this State, and the name and address of the officers or agents of the corporation in charge of its business in this State.

(*i*) The value of the property owned and used by the company in this State, where situated, and the value of the property owned and used outside of this State, and where situated.

(*j*) The volume of business done by the company in this State.

(*k*) The volume of business done by the company outside of the State, and where the said business is done.

(*l*) The change or changes, if any, in the above particulars, made since the last annual report.

SEC. 82 (6½). *Railroads.* Every railroad company doing business in this State shall annually on or before the thirtieth day of July make and return to the State Tax Commission, in such form and upon such blanks as shall be furnished by the State Tax Commission, and giving such information as the State Tax Commission shall require, for the purpose of carrying out the provisions of this section, and upon which report the State Tax Commission shall ascertain and certify to the State auditor the value upon which the amount of taxes which shall be paid by any such railroad company as a franchise or privilege tax shall be calculated. The basis upon which such calculation shall be made by the State Tax Commission and the extent to which every such railroad company is exercising its franchise in this State shall be

found to be the value of the property, tangible and intangible, of each such railroad company in the State assessed for the year in which such report is made for ad valorem taxes. The franchise tax of each such railroad company for the privilege of exercising its franchise in this State shall be one-tenth of one per cent (0.1%) of the value so ascertained by the State Tax Commission, and such tax shall be due and payable on or before the fifteenth day of October in each year. If any such company shall fail to make the report provided for, it shall be the duty of the State Tax Commission to make an approximation from the reports and records on file in that department of the amount of taxes due under this section, and certify same to the State auditor and treasurer for collection. No county, city or town shall be allowed to collect any taxes under this section.

SEC. 82 (7). Upon the filing of the report provided for in subsections four, five, and six, the commission, from the facts thus reported, and any other facts coming to its knowledge bearing upon the question, shall, on or before the first Monday in September, assess and fix the proportion of the subscribed or issued and outstanding capital stock of the company represented by its property or business in this State, and certify the same to the auditor of the State on or before the first Monday in October.

SEC. 82 (8). On or before October fifteenth the auditor of State shall charge for collection, as herein provided, annually from such company, in addition to the initial fees otherwise provided for by law, for the privilege of exercising its franchise in this State, a fee of one-tenth of one per cent upon the proportion of the subscribed or issued and outstanding capital stock of the corporation represented by property owned and used for or business transacted in this State as found and certified by the State Tax Commission, which fee shall not be less than ten dollars in any case. Such fee shall be payable to the treasurer of the State on or before the first day of the following December. No county, city or town shall have the power to levy any franchise tax under this section.

SEC. 82 (9). That nothing in the nine preceding subsections of this act shall apply to banks, insurance companies, fraternal, beneficent associations, building and loan associations, express, telephone or telegraph companies, or other corporations, upon which a franchise tax may be levied in other sections of this act.

(There follow certain administrative provisions and then, beginning with Section 100, follows Schedule D, the Income Tax on individuals and corporations.)

APPENDIX E.

Amendments to the Revenue and Machinery Acts Passed by the Special Session of the Legislature in December, 1921.

An Act to Amend Chapter 34 of the Public Laws of 1921, Being An Act to Raise Revenue, Relative to Privilege Tax and to Income Tax on Railroads.

The General Assembly of North Carolina do enact:

SECTION 1. That chapter thirty-four, Public Laws of one thousand nine hundred and twenty-one, section seventy-eight, be and the same is hereby amended by striking out the word "obsolete" and by inserting the amended section hereinafter set forth in section two of this act.

SEC. 2. That chapter thirty-four, Public Laws of one thousand nine hundred and twenty-one, section eighty-two, subsection six and one-half (6½), be and the same is hereby amended so as to read as hereinafter set forth in this section, and as so amended the said subsection six and one-half be and it is hereby transposed from the said section eighty-two to section seventy-eight of the said chapter, to stand as section seventy-eight of the said chapter, and to read as follows, to wit:

PRIVILEGE TAX ON RAILROADS.

Every railroad company doing business in this State shall annually, on or before the thirtieth day of July, make and return to the Commissioner of Revenue, in such form and upon such blanks as shall be required and furnished by him, and giving such information as he shall require for the purpose of carrying out the provisions of this section, a report upon which the Commissioner of Revenue shall ascertain and certify to the State Auditor the value upon which the amount of tax to be paid by any such railroad as a license or privilege tax shall be calculated. The value upon which such calculation shall be made by the State Auditor, and the measure of the extent to which every such railroad company is carrying on intrastate commerce within the State of North Carolina, shall be the value of the total property, tangible and intangible, in this State, of each such railroad company as assessed for *ad valorem* taxation for the year in which such report is made. The tax which every railroad company shall

pay for the privilege of carrying on intrastate commerce within this State shall be one-tenth of one per cent of the value so ascertained and certified by the Commissioner of Revenue, and such tax shall be due and payable on or before the fifteenth day of October in each year. If any such company shall fail to make the report provided for it shall be the duty of the Commissioner of Revenue to make an approximation from the reports and records on file in the State Department of Revenue of the value upon which the amount of tax due by the said company under this section shall be calculated, and to certify the said value to the State Auditor. Upon that value the State Auditor shall then calculate the amount of the said tax, as hereinbefore provided, and shall certify the same to the State Treasurer for collection. No county, city, or town shall be allowed to collect any taxes under this section: *Provided*, That it is the intention of this section to levy upon railroads a license or privilege tax for the privilege of engaging in intrastate commerce carried on wholly within the State of North Carolina and not a part of interstate or foreign commerce; that the tax provided for in this section is not intended to be a tax on the privilege of engaging in interstate commerce, nor is it intended to be a tax on the business of interstate commerce, nor is it intended to be a tax having any relation to the interstate or foreign business or commerce in which any such railroad company may be engaged in addition to its business in this State.

SEC. 3. That chapter thirty-four, Public Laws of one thousand nine hundred and twenty-one, section eighty-two, subsection nine (9), be and the same is hereby amended by inserting the word "railroads" in line two thereof between the words "to" and "banks."

An Act to Amend Chapter 38, *Public Laws of* 1921, *in Relation to the Assessment of Property and the Collection of Taxes of Railroads.*

The General Assembly of North Carolina do enact:

SECTION 1. That chapter thirty-eight, Public Laws of nineteen hundred and twenty-one, known as the Machinery Act of one thousand nine hundred and twenty-one, section sixty-five, be and the same is hereby amended by adding to the said section sixty-five a second proviso, as follows, to wit: *Provided further*, That railroads subject to the provisions of this act shall in every instance have the same right of appeal from any assessment, ruling, finding, order, or other action by the Commissioner of Revenue as is provided for and given to other corporations in section forty-three of this act, and under the same rules and conditions prescribed in the said section.

SEC. 2. This act shall be in force and effect from and after its ratification.

Ratified this the 15th day of December, A. D. 1921.

An Act to Refund Taxes Illegally Collected and Paid Into the State Treasury.

The General Assembly of North Carolina do enact:

SECTION 1. Whenever taxes of any kind are or have been through clerical error, or misinterpretation of the law, or otherwise, collected and paid into the State Treasury in excess of the amount legally due the State, the State Auditor shall issue his warrant for the amount so illegally collected, to the person entitled thereto, upon certificate of the head of the department through which said taxes were collected or his successor in the performance of the functions of that department, with the approval of the Attorney General, and the Treasurer shall pay the same out of any funds in the treasury not otherwise appropriated: *Provided*, Demand is made for the correction of such error or errors within two years from the time of such payment: *Provided further*, That claims which have arisen within five years next preceding the ratification of this act shall be presented and made within two years from the ratification of this act.

SEC. 2. This act shall be in force and effect from and after its ratification.

Ratified this the 19th day of December, A. D. 1921.

Office Supreme Court, U. S.
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CLERK

No. 9[illegible]368

IN THE

Supreme Court of the United States

SOUTHERN RAILWAY COMPANY,
Appellant,
vs.
A. D. WATTS, ET AL.,
Appellee.

No.....
In Equity.

Motion for Temporary Restraining Order Pending Appeal to Supreme Court under Section 266 of the Judicial Code of the United States.

PRESS OF THE BYRNE COMPANY, WASHINGTON

IN THE

SUPREME COURT OF THE UNITED STATES

SOUTHERN RAILWAY COMPANY, *Appellant,* *vs.* A. D. WATTS, ET AL., *Appellee.*	No..... In Equity.

Motion for Temporary Restraining Order Pending Appeal to Supreme Court under Section 266 of the Judicial Code of the United States.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now, appellant, Southern Railway Company, by its attorneys, representing to the Court that it has appealed to the Supreme Court of the United States from an order heretofore entered

herein on March 18, 1922, by the District Court of the United States for the Western District of North Carolina, denying appellant's application for an interlocutory injunction, which appeal has been allowed by said District Court and the record on said appeal has heretofore this day been filed and docketed in this Court, and respectfully moves the Court to grant a temporary restraining order herein pending the hearing and decision of such appeal by this Court, and for grounds of its motion shows:

1. On September 22, 1921, appellant (hereinafter called plaintiff) filed its bill in the United States District Court for the Western District of North Carolina, making as defendants thereto A. D. Watts individually and as Commissioner of Revenue of the State of North Carolina, Baxter Durham, Auditor of the State of North Carolina, Benjamin R. Lacey, Treasurer of the State of North Carolina, James S. Manning, Attorney General of the State of North Carolina, and forty-six Sheriffs of the several counties in North Carolina through which appellant operated and paid taxes, and ninety-seven Tax Collectors of the cities and towns through which appellant operated and paid taxes, and thirteen Tax Collectors of Special or Graded School Districts in which appellant operated and paid taxes. The necessity for having one hundred and sixty defendants was that the Revenue Commissioner certified the assess-

ment complained of to the several counties, cities and school districts so soon after the fixing of the assessment as that plaintiff had not an opportunity to enjoin the certification and therefore was compelled to enjoin the tax collecting officers of the State in each tax district from collecting taxes on the assessment which had been so certified.

2. The bill filed sought to enjoin the State's taxing officers (1) from collecting property taxes upon an excessive ad valorem assessment of $96,306,357.00; (2) from collecting a franchise tax under a void Franchise Tax Law; (3) from collecting a franchise or privilege tax based upon an excessive assessment of $96,306,357.00.

Ad Valorem Assessment. The advalorem assessment, it was averred, was illegal for the following reasons:

(a) The assessment of plaintiff's property at $96,306,357.00 is in excess of the true value in money of said property for tax purposes as the same is defined under the North Carolina law, and the collection of taxes thereon deprives plaintiff of the equal protection of the law contrary to the Constitution of the United States.

(b) The North Carolina tax officials failed and refused to follow the method prescribed by the statutes of North Carolina for the assessment of

railroads, but assessed the property of plaintiff on a basis not authorized or sanctioned by the North Carolina statute, such basis being arbitrary and illegal and the assessment arrived at therefore invalid.

(c) The method of valuation for tax purposes followed by the tax officers of North Carolina imported into the State of North Carolina values which are elsewhere and thus violated the Commerce Clause of the Constitution of the United States.

(d) The County Boards of Review of thirty-two of the counties through which plaintiff operates made horizontal reductions in the assessed value in said counties as a whole of real property ranging from 10 to 50 per cent. The Revenue Commissioner declined to give to plaintiff similar horizontal reductions in plaintiff's right of way, lands and structures thereon, situated in said counties. This was an illegal discrimination and this declination on the part of the Revenue Commissioner violated Section 3 of Article 5 of the Constitution of North Carolina and violated the Fourteenth Amendment to the Constitution of the United States.

(e) That the Uniformity Clause of the North Carolina Constitution and the Fourteenth Amendment of the Federal Constitution have been violated, in that, while plaintiff's property is

alleged by the State to be assessed at its true value for tax purposes, the property of other taxpayers generally in the State is habitually, customarily and systematically assessed for tax purposes at less than true value.

Franchise Tax. The following are the grounds upon which we base our contention that the franchise tax law is void:

(a) The ad valorem assessment being in excess of true value for tax purposes, the franchise tax based thereon violates the Constitution of North Carolina and the Constitution of the United States.

(b) The franchise tax demanded of plaintiff for the year 1921 is $96,306.35, which is one-tenth of one per cent of the aggregate assessed valuation of plaintiff's property of $96,306,357.00; whereas, under the provisions of Section 82(3½) of the Revenue Act of North Carolina of 1921, plaintiff should be required to pay upon only one-half of such value, for the reason that the proportion of the capital stock of plaintiff, a foreign corporation, apportionable to North Carolina is less than one-half of the assessed value for taxation of all the property of plaintiff in North Carolina for the year 1921. Therefore, the demand made by the State Auditor denies plaintiff equal protection of the law, in violation of the Four-

teenth Amendment to the Constitution of the United States.

(c) The so-called franchise tax is not a franchise tax, but is in fact an ad valorem tax. Since it is an ad valorem tax, it is void because not levied equally upon all property holders in the State, and is, therefore, contrary to Section 3 of Article 5 of the Constitution of North Carolina, and by reason of the enforcement thereof, plaintiff is deprived of the equal protection of the law contrary to the Fourteenth Amendment to the Constitution of the United States.

(d) If the so-called franchise tax be held to be a franchise tax and not a property tax, then it is unconstitutional and void, because it is a tax upon the privilege of engaging in interstate commerce and violates the Commerce Clause of the Constitution of the United States.

3. Plaintiff, at the time of filing its bill, made application for an interloctory injunction under Section 266 of the Judicial Code. The District Judge entered an order fixing October 6, 1921, for hearing the application for an interlocutory injunction and directing that not less than five days' notice be given the Governor and the State of North Carolina, and calling to his assistance to hear the application, Edmund Waddill, Jr., United States Circuit Judge, and Henry G. Connor, United States District Judge for the Eastern

District of North Carolina, and giving notice of the hearing to all defendants.

4. October 6, 1921, the Three-Judge Court assembled, defendants filed a motion to dismiss bill, which was denied. The plaintiff, by its counsel, and the defendants, through the Attorney General of North Carolina, on October 6, 1921, entered into a stipulation, which stipulation was approved by the three-judge bench and filed as a part of the record in this cause. The plaintiff in the stipulation agreed to pay and has paid all taxes, other than the franchise tax, as they might come due on an assessed valuation of sixty million dollars (the assessment complained of as being excessive and otherwise void being $96,306,357.00). The defendants agreed not to demand or collect or begin proceedings of any character for the nonpayment of said taxes on any valuation in excess of said sixty million dollars "until the further order of the Court or pending this action." The Court entered an order based upon the stipulation, reciting that the application for preliminary injunction had been continued by agreement of parties in order that the defendants might have time to answer and prepare their defense.

5. November 30, 1921, defendants filed their answer. Thereafter, plaintiff and defendants, within the time stipulated, filed affidavits in support of and against the application for interlocutory injunction.

6. January 24, 1922, the application for interlocutory injunction was heard by the Three-Judge Court, which took the matter under consideration and gave thirty days within which to file briefs.

7. March 18, 1922, the Three-Judge Court filed its per curiam opinion, which, without expression of reasons therefor, held that plaintiff had not made such a case as entitled it to an interlocutory injunction as prayed for and entered on the same day an order refusing and denying the injunction as prayed for. This order concluded as follows:

> "And it is further ordered that the defendants shall not proceed to enforce the collection of taxes involved in this litigation, for the period of thirty days from the date of this order, to the end that complainant may take such action in the premises as it is advised to."

8. March 31, 1922, plaintiff filed its petition for appeal and for an order staying the proceedings pending appeal to the Supreme Court. This petition was continued at the request of the State, as shown by the Court's order, to April 10, 1922.

9. April 10, 1922, the Court granted the appeal, but further ordered that plaintiff's petition for the further stay was continued for a hearing by the Three-Judge Court, and further ordered that the appeal was without prejudice to plaintiff as

to the later hearing of the matter of further stay asked for.

10. April 15, 1922, the Three-Judge Court denied the stay until the appeal could be decided by the Supreme Court, in the following language:

> "The Court, being of the opinion that the application to continue in effect the thirty-day stay granted March 18, 1922, until a review and decision can be had by the Supreme Court of the United States on the appeal heretofore taken from the order of this Court, denying the interlocutory injunction, should be presented to the Supreme Court of the United States, denies the application for continuance of said stay until the appeal is decided by the Supreme Court of the United States."

The Court extended the restraint of the State's officers ordered March 18, 1922, for thirty days, to May 15, 1922, in the following language:

> "And it appearing to the Court that the hearing of this application has been delayed through no fault of plaintiff's, and the Court being of the opinion that the status quo should be continued until the application for restraint pending the appeal can be made to and decided by the Supreme Court of the United States, ORDERS that the defendants shall not proceed to enforce the collection of taxes involved in this litigation for the period of thirty days from the date of this order."

Plaintiff further shows the Court that unless the defendants are restrained pending the decision of this Court on the appeal taken under Section 266 of the Judicial Code from the order of the Three-Judge Court denying the interlocutory injunction, the State's officers will immediately collect the taxes in dispute and plaintiff's appeal to this Court from the order denying the restraint will be fruitless and irreparable injury will be done it. If this Honorable Court should hold on the appeal now pending here that plaintiff was entitled to an interlocutory injunction, restraining until the merits the collection of the taxes on the excess of the ad valorem assessment over the assessment paid on by stipulation in the record or under the void franchise tax law, the value of that decision would be lost to plaintiff, because the plaintiff will have paid the taxes to restrain which payment until decision on the merits the appeal is taken; and if at the trial on the merits the assessment is held void, plaintiff will suffer irreparable injury in that it will have to bring more than 150 suits to recover the taxes illegally exacted and paid to the counties, cities and separate school districts in the State of North Carolina, and there is not any adequate remedy provided under the law of North Carolina for the recovery of the franchise tax, which is paid directly to the State's officers. On the contrary, if the State should win ultimately, it has a first lien on all of the property for the collection of said

taxes, with such penalty or interest as the law may allow.

In support of this motion, plaintiff attaches hereto a copy of the record in this case on appeal to this Court for interlocutory injunction, which record by stipulation thereto attached is made the record on this motion.

Wherefore, plaintiff prays that the temporary restraint herein asked be granted.

SOUTHERN RAILWAY COMPANY,

By S. R. PRINCE,

Its Attorney.

SOUTHERN RAILWAY COMPANY,
Plaintiff,

vs.

A. D. WATTS, ET AL.,
Defendants.

It is agreed by the parties to this cause that the record on appeal from the order denying the interlocutory injunction may be considered as the record on hearing of the motion of appellant for stay of the proceedings until the said appeal can be heard and determined.

.....
Attorney for Appellant.

.....
Attorney for Appellee.

SOUTHERN RAILWAY COMPANY,
Plaintiff,

vs.

A. D. WATTS, ET AL.,
Defendants.

The defendants will take notice that, on or before May 15 1922, the plaintiff will perfect its appeal of this suit to the Supreme Court of the United States, by filing the duly certified record thereof with the Clerk of said Court, and will thereafter, on the ~~1st~~ 22 day of May, 1922, about the hour of noon present to the Court in its court room in Washington, D. C., the foregoing motion for the maintenance of the statu quo and temporary restraint of the State's tax officers pending the determination of its said appeal.

This 26th day of April, 1922.

(S) S. R. Prince
Attorney for Appellant.

Receipt is acknowledged of the foregoing notice and defendants waive any further or other notice thereof. This 27th day of April, 1922.

(S) Wm. P. Bynum
Attorney for Appellee.

Office Supreme Court, U. S.
FILED
MAY 15 1922
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

ATLANTIC & YADKIN RAILWAY COMPANY,
Appellant,
vs.
A. D. WATTS, ET AL.,
Appellee.

In Equity
No. [redacted]369

BRIEF IN SUPPORT OF PETITION FOR STAY PENDING APPEAL TO THIS COURT UNDER SECTION 266 OF THE JUDICIAL CODE.

S. R. PRINCE,
Attorney for Appellant.

L. E. JEFFRIES,
MANLY, HENDREN & WOMBLE,
A. B. ANDREWS,
Of Counsel.

PRESS OF THE BYRON S. ADAMS PRINTING COMPANY, WASHINGTON

IN THE

Supreme Court of the United States

ATLANTIC & YADKIN RAILWAY COMPANY,
Appellant,
vs.
A. D. WATTS, ET AL.,
Appellee.

In Equity No. 928.

BRIEF IN SUPPORT OF PETITION FOR STAY PENDING APPEAL TO THIS COURT UNDER SECTION 266 OF THE JUDICIAL CODE.

Statement of Facts.

The petition filed sets forth the basis of this suit and the successive steps taken in this suit up to date. This case in all its stages below was submitted with the case of Southern Railway Company vs. A. D. Watts, et al., and the lower court

entered similar orders in this case at each stage to those entered in the Southern Railway case, in which latter case a similar motion has this day been filed. The motion in this case sets forth the differing facts. There is no difference in principle. There is a difference in degree.

The appellant respectfully asks leave of the Court to consider as its brief in support of this motion the brief filed this day in support of the motion in the Southern Railway Company case, supra.

Respectfully submitted,

S. R. PRINCE,
Attorney for Appellant.

L. E. JEFFRIES,
MANLY, HENDREN & WOMBLE,
A. B. ANDREWS,
Of Counsel.

FILED
MAY 10 1927
WM. R. STANSBURY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No. 368

THE SOUTHERN RAILWAY COMPANY, *Appellant*,

vs.

A. D. WATTS, *as Commissioner of Revenue of North Carolina*.

No. 369

ATLANTIC & YADKIN RAILWAY COMPANY, *Appellant*,

vs.

A. D. WATTS, *as Commissioner of Revenue of North Carolina*.

No. 381

SEABOARD AIR LINE RAILWAY COMPANY, *Appellant*,

vs.

A. D. WATTS, *as Commissioner of Revenue of North Carolina*.

No. 382

ATLANTIC COAST LINE RAILROAD COMPANY, *Appellant*,

vs.

A. D. WATTS, *as Commissioner of Revenue of North Carolina*.

No. 383

NORFOLK SOUTHERN RAILROAD COMPANY, *Appellant*,

vs.

A. D. WATTS, *as Commissioner of Revenue of North Carolina*.

BRIEF FOR APPELLEES IN OPPOSITION TO MOTIONS FOR TEMPORARY RESTRAINING ORDERS PENDING APPEALS.

JAMES S. MANNING,
Attorney General of North Carolina,
FRANK NASH,
Assistant Attorney General,
Counsel for Appellees.

GEORGE H. BROWN,
WILLIAM P. BYNUN,
LOCKE CRAIG,
THOMAS D. WARREN,
SIDNEY S. ALDERMAN, *Of Counsel*.

(28,882)

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

IN EQUITY.

Nos. 927, 928, 960, 961, 962.

SOUTHERN RAILWAY COMPANY, APPELLANT,

vs.

A. D. WATTS ET AL., APPELLEES.

BRIEF OF APPELLEES IN OPPOSITION TO THE MOTION FOR TEMPORARY RESTRAINING ORDER PENDING APPEAL TO THE SUPREME COURT UNDER SECTION 266 OF THE JUDICIAL CODE OF THE UNITED STATES.

The plaintiff, Southern Railway Company, and the Atlantic & Yadkin Railway Company, in September, 1921, brought their suits in the United States District Court for the Western District of North Carolina, at Greensboro, and the Atlantic Coast Line Railway, the Seaboard Air Line Railway, and the Norfolk-Southern Railway about the same time filed their complaints in the United States District Court for the Eastern District of North Carolina, at Raleigh, against the Revenue Commissioner, the Treasurer, the Attorney General, and

other officials of the State, assailing the taxing laws of North Carolina as unconstitutional and void so far as they relate to the plaintiffs in those suits. In their complaints the plaintiffs asked for an interlocutory injunction under Section 266 of the Judicial Code. At a preliminary hearing, stipulations were entered into between the parties whereby certain portions of the taxes admittedly due should be paid by the plaintiffs, the payment of the remaining amounts due to await the further order of the court pending the application for the interlocutory injunctions.

The defendants fully answered the complaints, and time was allowed by the court to file affidavits, exhibits, proofs, etc., by the respective parties. The five cases were then set down for hearing by the three judges constituting the court, under Section 266 of the Judicial Code, on January 24, 1922, when the cases were heard at length on oral argument and printed briefs. The judges took the cases under consideration until March 18, 1922, when they rendered their decision, unanimously denying the applications for interlocutory injunctions, holding that:

> "The court, after consideration of the bills, exhibits, affidavits and arguments of counsel, is of the opinion that, for the purpose of this motion only, complainants have neither in their pleadings, nor upon the proofs adduced, made such a case as entitled them to have an interlocutory injunction in said causes as prayed for and the motions for such interlocutory injunctions in respect to the *ad valorem* and the franchise and privilege tax should not be granted and said motions and each of them are denied."

The court further held that the contentions sought to be made by the plaintiffs in regard to the imposition and en-

forcement of the income tax were not presented upon the bills and proofs filed in these suits, and it therefore expressed no opinion with respect to the validity of the income tax or the statutes enacted for its enforcement and held that the plaintiffs in respect to such income tax might proceed without prejudice in such manner as they might be advised.

Accordingly, the plaintiffs in all these tax cases have instituted independent suits, which are now pending in the District Court of the United States for the Eastern District of North Carolina, challenging the validity of the income-tax laws of North Carolina, and the validity of those laws are therefore in no way involved in the cases at bar nor in the applications to this court for restraining orders.

The court, however, ordered that the defendants should not proceed to enforce the collection of the taxes involved in the litigation for a period of thirty days from the date of their decision, to the end that the plaintiffs might take such action in the premises as they might be advised.

Appeals were duly taken to this court, and the plaintiffs thereupon applied to the three judges for a continuance of the order forbidding the defendants from proceeding to enforce the collection of the taxes involved until the appeals had been heard and determined by this court. After due consideration, this application was unanimously denied by the three judges constituting the court. But the defendants were directed not to enforce the collection of the taxes involved in the litigation for a period of thirty days from April 15, 1922, in order that the plaintiffs might have time to apply to this court for the restraint desired.

Inasmuch as these applications by the several railroads referred to for restraining orders present the same questions,

the appellees asked to be permitted to file this one brief in opposition to all the motions, and that it be considered as filed in all the cases.

The appellees, officers representing the State, oppose the granting of the restraining orders by this court:

1.

Because, even if this court has the power to grant, on motion, the restraining orders applied for after the judges below declined to grant them, it is respectfully submitted that it should not exercise this power now, but await the hearing of the cases on their merits. By granting the restraining orders this court, on a mere motion, would be doing what the three judges constituting the court below, after careful examination of the merits of the cases, declined to do.

A pertinent discussion of this identical question is found in the case of *Louisville & N. R. Co. v. Railroad Commission*, 208 Fed. Rep., 35, at pages 58 and 59, where the court, passing upon an application for a restraining order like those presented here, through Shelby, circuit judge, says:

> "The application now before the court seeks to enjoin or stay the order of the Commission pending an appeal by the plaintiff to the Supreme Court from the order refusing the interlocutory injunction. The first application was for an injunction pending the suit which stood for trial in the District Court. The second application is for injunctive order pending the appeal. Relief on either application meant the suspension of the rates fixed by the Commission and the reestablishment of the higher rates fixed by the plaintiff. Both applications are urged by the same arguments and the same offer of bond. I can see no reason for granting the second application that would not

have been equally applicable to granting the first. * * * It seems to me utterly useless to have refused the first application if the second is to be granted. If a case is now presented for the exercise of judicial discretion by revoking, in effect, our former order, we should have granted the interlocutory injunction on the first application. We gave reasons for the refusal of the injunction which seem to me equally controlling on the second motion. Conceding that the statutes allow a supersedeas after denial of the injunction in cases arising under Section 266, we have before us practically the same question that we had on the first application—whether or not the Commission's order should be in force pending the litigation. The only difference is that the Commission's order is now fortified by the opinion of this court. Having refused to enjoin it and having put it in force on its merits after full hearing, it seems to me that it would be practically a reversal of our position to suspend it now after our elaborate approval of it."

And, concluding the opinion, the court says:

"But if it be conceded that the statute or the general law gives us a discretionary power to set aside the Commission's rate now in force and to reinstate the rates fixed by the Railroad Company—a question not necessary to decide now—I do not think a case is presented for the exercise of such discretionary power. The application to continue the restraining order should be refused, because we have already decided that the rate fixed by the Commission should not be enjoined."

The same reasoning is applicable to the motions presented here. If this court should grant the restraining orders applied for, it would in effect be overruling the decision of the

three judges denying the interlocutory injunction and passing upon the merits of the question to be presented on appeal, and that on a mere motion.

II.

It is not necessary for this court to grant the restraining orders applied for, since the plaintiffs can and will suffer no irreparable injury if the motions are refused.

This court can find upon these motions that unless they are granted the plaintiffs will suffer irreparable injury only upon the assumption that the State of North Carolina will deliberately be unmindful of and will wrongfully repudiate its legal obligations. This presumption should not be indulged.

Besides, the right of the plaintiffs to recover taxes illegally paid is fully protected by the laws of North Carolina. This appears from the following statutes of that State:

> "Whenever taxes of any kind are or have been, through clerical error or misinterpretation of the law, or otherwise, collected and paid into the State Treasury in excess of the amount legally due the State, the State Auditor shall issue his warrant for the amount so illegally collected to the person entitled thereto, upon certificate of the head of the department through which said taxes were collected or his successor in the performance of the functions of that department, with the approval of the Attorney General, and the Treasurer shall pay the same out of any funds in the treasury not otherwise appropriated. *Provided*, demand is made for the correction of such error or errors within two years from the time of such payment. *Provided further*, that claims which have arisen within the five years next preceding the ratification

of this act shall be presented and made within two years from the ratification of this act."

This act was passed by the General Assembly of North Carolina at a special session the 19th day of December, 1921.

In addition to the foregoing statute, Section 7979 of the Consolidated Statutes of North Carolina provides as follows:

> "Whenever any person shall claim to have a valid defense to the enforcement of a tax or assessment charged or assessed upon his property or poll, such person shall pay such tax or assessment to the Sheriff; but if, at the time of such payment, he shall notify the Sheriff in writing that he pays the same under protest, such payment shall be without prejudice to any defenses or rights he may have in the premises, and he may, at any time within thirty days after such payment, demand the same in writing from the Treasurer of the State or of the county, city or town for the benefit or under the authority or by request of which the same was levied; and if the same shall not be refunded within ninety days thereafter, he may sue such county, city, or town for the amount so demanded, including in his action against the county, both State and county tax; and if upon the trial it shall be determined that such tax or any part thereof was levied or assessed for an illegal or unauthorized purpose, or was for any reason invalid or excessive, judgment shall be rendered therefor, with interest, and the same shall be collected as in other cases. The amount of State taxes for which judgment shall be rendered in such action shall be refunded by the State Treasurer."

In addition to the foregoing statutes, the Attorney General and other State officers, parties defendant to these suits, have guaranteed in behalf of the State and the other taxing

officers to repay to the plaintiffs any taxes the collection of which is by this motion sought to be restrained in case the court should ultimately decide that such taxes were illegally or wrongfully collected.

III.

The only reason the plaintiffs adduce in support of their contention that this court should grant these restraining orders pending the appeal is their assertion that unless this is done, and if the tax-collecting authorities of the State and its subdivisions should repudiate the legal obligations of the State to the plaintiffs and refuse to repay these taxes if the courts finally declare them to have been illegally collected, the plaintiffs will be put to a multiplicity of suits in order to recover them even under the provisions of the State statutes.

As to this contention we say, first, that the occasion will not arise; that if the courts declare these taxes to be illegal they will be repaid to the plaintiffs without contest; that the State authorities have pledged that they will repay amounts paid to the State and will direct and procure repayment of amounts paid to subdivisions if the taxes are ultimately declared illegal. We say it is not to be presumed that the State and its subdivisions will do wrong.

Moreover, this contention of the plaintiffs has no applicability whatsoever to the taxes which are paid directly to the State, the franchise taxes. If the State officials should violate its clear obligation and refuse to repay taxes which have been declared illegal, still as to the franchise taxes which are paid directly to the State Treasurer the plaintiffs could not possibly be put to a multiplicity of suits. One suit

against the Treasurer under the provisions of the statute of 1921 would give full relief and recovery, even if he should refuse voluntarily to repay them. Under no possible aspect of the question, therefore, is there any reason to grant these restraining orders here moved for as to the taxes which are paid directly to the State Treasurer, and certainly as to those taxes the motions should be refused. For the other reasons herein set forth we submit the motions should be refused as to all the taxes.

The reasoning of this court in *State Railroad Tax Cases*, 92 U. S., 575, at page 613, is entirely applicable in consideration of these motions.

> "The Government of the United States has provided, both in the customs and in the internal revenue, a complete system of corrective justice in regard to all taxes imposed by the General Government, which in both branches is founded upon the idea of appeals within the executive department. If the party aggrieved does not obtain satisfaction in this mode, there are provisions for recovering the tax after it has been paid, by suit against the collecting officer. But there is no place in this system for an application to a court of justice until after the money is paid.
>
> "That there might be no misunderstanding of the universality of this principle, it was expressly enacted in 1867, 'that no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.' Rev. Stat., Sect. 3224. And though this was intended to apply alone to taxes levied by the United States, it shows the sense of Congress of the evils to be feared if courts of justice could, *in any case,* interfere with the process of collecting the taxes on which the Government depends for its

> continued existence. It is a wise policy. It is founded in the simple philosophy derived from the experience of ages, that the payment of taxes has to be enforced by summary and stringent means against a reluctant and often adverse sentiment; and to do this successfully, other instrumentalities and other modes of procedure are necessary than those which belong to courts of justice. See *Cheatham v. Norwell,* decided at this term; *Nickoll v. United States.* 7 Wall., 122; *Dow v. Chicago,* 11 Wall., 108."

It is therefore respectfully submitted that the motions for restraining orders in these cases should be denied and the defendants allowed to proceed to the collection of the taxes remaining unpaid. If on a hearing upon the merits the decree of the court below should be reversed, the State authorities stand ready to refund any taxes found to be illegally collected, and even if they should not do so voluntarily the plaintiffs are amply protected by the statutes of the State against any injury by reason of the payment of such taxes.

Respectfully submitted,

JAMES S. MANNING,
Attorney General of North Carolina;

FRANK NASH,
Assistant Attorney General,
Solicitors for Defendants.

GEORGE H. BROWN,
WM. P. BYNUM,
LOCKE CRAIG,
THOS. D. WARREN,
SIDNEY S. ALDERMAN, *Counsel.*

FILED
MAY 15 1922
WM. R. STANSBURY
CLERK

IN THE

Supreme Court of the United States

SOUTHERN RAILWAY COMPANY,
Appellant,
vs.
A. D. WATTS, ET AL.,
Appellee.

In Equity
No. [redacted]368

BRIEF IN SUPPORT OF PETITION FOR STAY PENDING APPEAL TO THIS COURT UNDER SECTION 266 OF THE JUDICIAL CODE.

S. R. PRINCE,
Attorney for Appellant.

L. E. JEFFRIES,
MANLY, HENDREN & WOMBLE,
C. O. AMONETTE,
Of Counsel.

PRESS OF THE BYRNARTH COMPANY, WASHINGTON

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IN THE

Supreme Court of the United States

SOUTHERN RAILWAY COMPANY, *Appellant,* *vs.* A. D. WATTS, ET AL., *Appellee.*	In Equity No. 927

BRIEF IN SUPPORT OF PETITION FOR STAY PENDING APPEAL TO THIS COURT UNDER SECTION 266 OF THE JUDICIAL CODE.

Statement of Facts

The petition filed sets forth the basis of this suit and the successive steps taken in this suit up to date. As concisely as can be stated, the situation of petitioner is:

For the year 1919 the ad valorem assessment of appellant in the State of North Carolina was

$46,869,942.00. In 1920 the ad valorem assesswent was increased to $96,605,694.00. Appellant paid its 1920 taxes thereon under written protest. Due to the reduced tax rate and there being no State tax, the actual amount of taxes paid in 1920 on the higher assessment was less than the tax paid in 1919 on the reduced assessment. In 1921 appellant's assessment was $96,306,357.00, being the same as 1920, except for minor changes in local property lying off the right of way. A hearing was had before the Commissioner of Revenue and testimony introduced to show that the assessment was in excess of the true "actual value," and it was earnestly contended that appellant was entitled to the same horizontal reductions on its right of way land in the several counties as had been given all other real property in said counties. The assessment was not reduced.

In 1919 the General Assembly of North Carolina passed a law (Laws of North Carolina 1919, page 115) providing for a revaluation of all the property in the State. At the Extra Session in 1920 (Public Laws, Extra Session, 1920, Chapter 1) the Legislature adopted the revaluation. In that law (Section 7) it was provided that there should be no ad valorem tax for the use of the State, but in lieu of that there should be levied a franchise tax. Under this law, the franchise tax on this railway company was increased from $10.00 per mile to one-tenth of one per cent on the ad valorem assessment. Under this, appel-

lant's franchise tax was increased from $10,930.00 in 1919 to $96,306.00 in 1921.

The next step was the enactment of Section 28(a) of the Machinery Act of 1921 in which County Boards were given the right to make a horizontal reduction in assessments in their respective counties. The County Boards did not have the right to reduce the railroad's assessments, because they did not make the assessments and had no jurisdiction of them. Thirty-two counties through which appellant operates made horizontal reductions in the assessment of real property ranging from 10 to 50 per cent. The Commissioner of Revenue declined to make any reduction in appellant's property. In all except two counties through which appellant operates there was a heavy increase in the rate of taxation ranging from 12¼ to 84 cents per hundred dollars. If the assessment remains, appellant will pay in actual taxes for the year 1921 the sum of $1,243,-715.00, an increase of $368,622.00 over 1920. Under an agreement of counsel, approved by the Court, appellant has paid its taxes on a sixty million dollar valuation and the amount paid to counties, cities, towns and school districts is $61,000.00 in excess of the amount paid in 1920 on the ninety-six million dollar valuation. This is due to the increase in the rate of taxation.

The State in its answer avers that the assessment of ninety-six million dollars for 1921 is the true actual value of appellant's property. Appel-

lant shows that it is in excess of the true actual value. Under the capitalization of earnings plan, it was excessive to the amount of twenty-five million dollars. Under the market value of stock and bonds plan, it was excessive to the extent of fifty million dollars. Under the replacement value, it was excessive to the extent of thirty-five million dollars.

Real property generally in the State was assessed for the year 1921 at 67 per cent of its true value, as evidenced by a complete list of all deeds recorded in every county in the State January 1, 1921, to July 1, 1921, where the consideration was in excess of $1,000.00. This list contained in excess of 6,400 deeds and showed the deed value as compared with the assessed value. The total of the recorded deed value was $30,598,475.24 and the total assessed value of the same property was $20,373,684.07, or approximately 67 per cent.

Brief.

Petitioner is granted by Section 266 of the Judicial Code an appeal to this Court from the denial of a restraining order by the District Court and the two judges called to his assistance. If the appeal is to be of any value to the petitioner, the status quo should remain until that appeal can be heard and determined. Appellant thought and still thinks that the Three Judge Court had the power and that it was its duty to maintain

the status until the appeal could be heard. That view is based upon the following decisions:

In the case of L. & N. R. R. Co. vs. Siler, 186 Fed. 176, the Three Judge Court continued the status quo pending the appeal. The Court said, beginning on page 203:

> "It follows that the motion for an interlocutory injunction in both its branches must be denied. However, the questions involved are of such importance that we assume that a review of our conclusions will be desired by complainant, pursuant to the special provision for such review found in section 17 of the act of June 18, 1910. If the Supreme Court, on such review, shall decide that complainant was entitled to this injunction, then it is apparent that our present refusal to grant the injunction would result in irremediable injury, on account of failure to preserve the status quo. Applying the reasons of the rule stated in Hovey vs. McDonald, 109 U. S. 150,161,3 Sup.Ct.136, 27 L.Ed.388, and further stated in Cotting vs. Kansas City Stockyards Co., supra, 183 U. S. 79, 80, 22 Sup. Ct. 30, 46 L. Ed. 82, we have concluded that the restraining order of September 7, 1910, should be continued until an opportunity has been given for the complainant to secure a review, and subject to conditions which will be prescribed in the order to be entered."

Attention is directed especially to this language of that court: "If the Supreme Court, on such review, shall decide that complainant was entitled

to this injunction, then it is apparent that our present refusal to grant the injunction would result in irremediable injury, on account of failure to preserve the status quo." That language is equally applicable to this case. Should the Supreme Court of the United States decide that this complainant is entitled to the injunction applied for, then the refusal of this Court to preserve the status quo would result in irremediable injury to complainant.

In Ohio River & W. Ry. Co. vs. Ditty, 203 Fed. 537, the Three Judge Court continued in effect the restraining orders until the plaintiffs should have an opportunity to secure a review. The Court said, beginning on page 549, as follows:

> "It follows that the motion for an interlocutory injunction in each case must be denied. However, the questions involved are of such importance that we assume that a review of our conclusions will be desired by the plaintiffs, pursuant to the special provision found in section 266, Judicial Code (Act of March 3, 1911, c. 231, 36 Stat. 1162 (U. S. Comp. St. Supp. 1911, p. 236).
>
> "We have accordingly concluded that the restraining orders heretofore granted shall be continued until an opportunity has been given for the plaintiffs to secure a review, and subject to conditions which will be prescribed in the order to be entered."

In Grand Trunk Ry. Co. vs. Michigan Railroad Commission, 198 Fed. 1009, the Three Judge

Court withheld the formal entry of orders in accordance with its opinion in order to give complainants an opportunity to present application for a continuance of the restraining order pending the appeal. The Court said on page 1023 as follows:

> "It follows from what has been said that the application for interlocutory injunction should be denied, and the existing restraining order vacated. As the questions presented are important and review may be desired, the formal entry of the orders in accordance with this opinion will be withheld until September 5th, next, to give complainants opportunity to present such applications as they may desire for a continuance of the restraining order pending appeal (under the rule stated in Hovey vs. McDonald, 109 U. S. 150, 161, 3 Sup. Ct. 136, 27 L. Ed. 888, and Cotting vs. Kansas City Stockyards Co., 183 U. S. 79, 80, 22 Sup. Ct. 30, 46 L. Ed. 92) in case such appeal is to be taken."

In Phoenix Ry. Co. of Arizona vs. Geary, 209 Fed. 694, the Three Judge Court, while denying the motion for an interlocutory injunction, continued the restraining order in force pending the appeal. This action of the Three Judge Court was tacitly approved by the Supreme Court of the United States in Phoenix Ry. Co. vs. Geary, 239 U. S. 277, in which case the Court said on page 281 as follows:

"The Court held (209 Fed. Rep. 694) that complainant's showing as to the alleged unreasonableness of the Commission's order was not sufficiently strong to warrant an injunction to restrain its enforcement *pendente lite,* but the temporary restraining order was continued in force pending the present appeal, taken direct to this court under the cited section of the code."

We have found no case to the contrary. The diligence of appellee's counsel found no case to the contrary, and their only reliance was the specially concurring opinion of Judge Shelby in the case of L. & N. vs. Railroad Commission, 208 Fed. 29, at page 58. It will be noted that this was a specially concurring opinion, the reasoning of which was not agreed to by the Court, and that the Court in that case ordered:

"It is therefore ordered that the plaintiff's application for the allowance of the appeal and for supersedeas or a restraining order against the enforcement of the order of the Railroad Commission of Alabama, pending the appeal, be denied, the court not passing upon the merits of the application, and without prejudice to the right of the plaintiff to renew its application for an appeal and for a restraining order, pending the appeal, in the Supreme Court, or as it may be advised."

The Three Judge Court did not in this case pass upon the merits of the motion for a stay, but expressed the opinion that the Supreme Court

was the proper court to grant the stay (Order of April 15, 1922, p. 9 of Motion). It stayed the State's hand for two thirty-day periods upon the idea that not to do so would be an injustice to appellant. For the same reason that the State's hand was stayed sixty days, it should be stayed until this court can pass upon the appeal.

This Court has the undoubted power and authority to continue the stay in effect. This is the view of this Court on the general question of the powers of an equity court, which powers apply with equal force to an appeal under Section 266 of the Judicial Code. The leading case is that of Hovey vs. McDonald, 109 U. S. 150. In that case the Supreme Court of the United States discussed the power of the lower court to maintain the status quo on page 161 of the opinion as follows:

> "It was decided that neither a decree for an injunction nor a decree dissolving an injunction was suspended in its effect by the writ of error, though all the requisities for a supersedeas were complied with. It was not decided that the court below had no power, if the purposes of justice required it, to order a continuance of the status quo until a decision should be made by the appellate court, or until that court should order the contrary. This power undoubtedly exists, and should always be exercised when any irremediable injury may result from the effect of the decree as rendered; but it is a discretionary power, and its exercise or non-exercise is not an appealable matter. In recognition of this power,

and for the purpose of facilitating its proper exercise in certain cases, on appeals from the circuit courts, this court by an additional rule of practice in equity, adopted in October term, 1878, declared that:

"'When an appeal from a final decree, in an equity suit, granting or dissolving an injunction, is allowed by a justice or judge who took part in the decision of the cause, he may, in his discretion, at the time of such allowance, make an order suspending or modifying the injunction during the pendency of the appeal upon such terms as to bond or otherwise as he may consider proper for the security of the rights of the opposite party.' Rule 93."

The Court also said on page 162 as follows:

"Applying these principles to the present case, it is clear that the force of the decree was not affected by the appeal, although it was in the power of the special term to have continued the injunction and to have retained the fund in its control in the hands of the Receiver had it seen fit to do so. Judging only from what appears in the record, we cannot refrain from saying that, in this case, the latter course would have been eminently proper. It would have protected all parties and produced injury to none. But if the court failed to do what it might properly have done, such failure ought not to be visited upon the receiver, who was the mere instrument and hand of the court, and subject to its order. It was his duty to obey the decree as made."

Unless the stay applied for is granted the tax collecting authorities of North Carolina will proceed at once to collect the tax, the validity of which is involved in this suit. Should such tax be collected and disbursed prior to the determination of this case, a victory on the part of complainant would be fruitless.

The principles enunciated in Hovey vs. McDonald were applied in Cotting vs. Kansas City Stockyards Company, 82 Fed. 850. In that case the Court said on page 857 as follows:

> "The great importance of the questions involved in these cases will doubtless occasion an appeal to the Supreme Court of the United States, where they will be finally settled and determined. If, on such appeal, the Kansas statute complained of should be adjudged invalid for any reason, and in the meantime the statutory schedule of rates should be enforced, the stockyards company would sustain a great and irreparable loss. Under such circumstances, as was said, in substance, by the supreme court in Hovey vs. McDonald, 109 U. S. 150, 161, 3 Sup. Ct. 136, it is the right and duty of the trial court to maintain, if possible, the status quo pending an appeal, if the questions at issue are involved in doubt; and equity rule 93 was enacted in recognition of that right. The court is of opinion that the cases at bar are of such moment, and the questions at issue so balanced with doubt, as to justify and require an exercise of the power in question. Therefore, although the

bills will be dismissed, yet an order will at the same time be entered restoring and continuing in force the injunction which was heretofore granted, for the term of 10 days, and if, in the meantime, an appeal shall be taken, such injunction will be continued in force until the appeal is heard and determined in the supreme court of the United States; provided that, in addition to the ordinary appeal bond, the Kansas City Stock Yards Company shall make and file in this court its bond in the penal sum of $200,000, payable to the clerk of this court and his successors in office, for the benefit of whom it may concern, conditioned that, in the event the decree dismissing the bills is affirmed, it will, on demand, pay to the party or parties entitled thereto all overcharges for yarding and feeding live stock at its stock yards in Kansas City, Kan., and Kansas City, Mo., which it may have exacted in violation of sections 4 and 5 of the Kansas statute relative to stock yards, approved March 3, 1897, since an injunction was first awarded herein, to-wit, on April , 1897, and that it will in like manner pay such overcharges, if any, as it may continue to exact in violation of said statute during the pendency of the appeal; said obligation to become void if the statute in question shall be pronounced invalid by the supreme court."

In the case of Omaha and Council Bluffs Street Railway Co. vs. I. C. C., 222 U. S., 582, this Court held that it was proper for an order to be entered by it to maintain the status quo pending an appeal

from the judgment of the Commerce Court sustaining an order of the Interstate Commerce Commission.

This Court, in the case of Journal of Commerce and Commercial Bulletin vs. Burleson, 229 U. S., 60, granted a restraining order pending a decision. See to the same effect In re Alexander McKenzie, Petitioner, 180 U. S., 536, at page 549, and U. S. vs. Shipp, 203 U. S., 563, at page 573.

Appellant has not delayed the trial of this case in any way for any length of time. It has offered to try the case on its merits at the June Term of the Federal Court. We still believe that it was the duty of the lower court to pass upon this question of maintaining the status quo, because that Court knew all the facts and had examined into the question in order to pass upon the motion for an interlocutory injunction, and it seems to us proper that that Court should pass upon the question of granting or not granting the stay. We have not the slightest doubt that if the lower court had been of the opinion that it was the proper forum to pass upon the question of maintaining the status that the stay would have been granted.

As to irreparable damage which will be suffered should the stay not be granted—appellant will be compelled to bring 180 suits to recover the amount of the taxes paid if finally held to be illegally paid, and that alone is irreparable damage. The irreparable injury should be determined not so much

upon the question of whether appellee may not recover the tax, but, we submit, is based upon the fact that the statute, 266 of the Judicial Code of the United States, allows appellant an appeal from the failure to grant an interlocutory injunction, and unless the status quo is maintained, this appellant is virtually denied the right given it, because an appeal will be valueless unless the status quo is maintained. This Court, in the exercise of its equity powers, is not held to an exercise of them, only in the case of irreparable damage. In other words, in this case the appellant is not required to show the irreparable injury in the strict sense of the word, in so far as the ultimate outcome is concerned. As stated, we have a right to the appeal, and if not to maintain the status will irreparably deprive us of it unless the relief sought is granted, then irreparable damage follows.

In the case of N. C. & St. L. Ry. Co. vs. M'Connell, 82 Fed., 65, the Railway sought an injunction against ticket scalpers, that is, persons who bought up unused portions of return trip tickets and sold them. The Court held that plaintiff was entitled to an injunction. On page 68 the Court discussed the relief or redress of the carrier in case the injunction was not granted. It held that complainants were without adequate redress at law, due to the large number of suits for small amounts which would have to be instituted if the carrier was confined to his remedy at law. The Court said on this particular point:

"If 500 separate suits at law for breach of the contract in each ticket is the only mode of redress to the carrier, it requires no comment to show that here is a striking failure of justice. The injury is obviously irreparable."

In addition to that, there is no law permitting suit against the State for the recovery of the franchise tax of ninety-six thousand dollars, which is payable direct to the State, and if that tax be held illegal, there is no method prescribed to recover the sum. The State of North Carolina has not consented to be sued therefor.

Appellant is embarrassed in the briefing of this motion because it is refraining from discussing the merits of the controversy now pending on the appeal. The assessment so made and complained of will remain for three years, and the amount involved for this appellant is in excess of one million dollars.

The Court's attention is directed to the stipulation of record between counsel for the parties, that notwithstanding the stay granted by the lower court expires May 15th, the status quo is to remain until this Court has passed upon the motion here presented.

Respectfully submitted,

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Of Counsel.

FILED
OCT 27 1922
WM. R. STANSBU
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 368.

THE SOUTHERN RAILWAY COMPANY, *Appellant,*

vs.

A. D. WATTS, *as Commissioner of Revenue of North Carolina.*

No. 369.

ATLANTIC & YADKIN RAILWAY COMPANY, *Appellant,*

vs.

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No. 381.

SEABOARD AIR LINE RAILWAY COMPANY, *Appellant,*

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No. 382.

ATLANTIC COAST LINE RAILROAD COMPANY, *Appellant,*

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No. 383.

NORFOLK SOUTHERN RAILROAD COMPANY, *Appellant,*

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BRIEF ON ARGUMENT FOR DEFENDANT IN ERROR

GEORGE H. BROWN,
Counsel for Defendant in Error.

(28,882, &c.)

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BRIEF ON ARGUMENT FOR DEFENDANT IN ERROR

The North Carolina Railroad Tax Cases.

Three kinds of taxes are imposed on railroad companies doing business in North Carolina by the Legislature, the validity of which is contested; a franchise tax: an *ad valorem* tax on property and an income tax.

The two first-named taxes are before this court. The income tax has been eliminated and is the subject of other suits. The contentions of plaintiffs, appellants, are succinctly stated in the judgment of the court below as follows:

> 1. That the property of complainants was not assessed in the same manner and by the same method as the property of the individual citizens of the State and that the manner and methods by which complainants' property is appraised and assessed for taxation operates as an unjust and unlawful discrimination against complainants, in violation of the provisions of the Fourteenth Amendment to the Constitution of the United States and that, thereby, complainants are deprived of their property without due process of law.
>
> 2. That the appraisal and assessment for taxation of the property of complainants are not made in accordance with the provisions of the Constitution and statutes of the State of North Carolina and that said appraisal and assessment of taxes thereon are invalid.
>
> 3. That the appraisal of the value of complainants' property is in excess of its true value, for the purpose of taxation, as provided by the Constitution of North Carolina and is, therefore, invalid.
>
> 4. That the uniformity clause of the Constitution of North Carolina and the Fourteenth Amendment to the Constitution of the United States, in the appraisal and assessment of complainants' property, are violated in that complainants' property, alleged by the State to be assessed at its true value for taxation, the property of other tax payers in the State is appraised and assessed for taxation at less than its true value.
>
> That the franchise or privilege tax imposed upon complainants is invalid for that:

1. The *ad valorem* assessment is in excess of its true value for taxation and that the franchise or privilege tax, based thereon, in accordance with the statutes of the State, violates the Constitution of the United States and the State of North Carolina.

2. The franchise or privilege tax is, in truth and fact, an *ad valorem* tax and invalid, because not imposed upon the property of other citizens of the State.

3. That the statute of North Carolina under and pursuant to which the franchise or privilege tax is imposed and sought to be enforced imposes a tax upon the privilege of doing business by complainants, both interstate and intrastate, and is, therefore, a burden upon interstate commerce and thereby violates the commerce clause of the Constitution of the United States.

4. That, if the franchise, or privilege tax, imposed upon complainants be valid, the method of ascertaining the value of complainants' property as a basis for fixing the amount of said franchise or privilege tax includes property of complainants used, as well in interstate as intrastate commerce, and violates the commerce clause of the Constitution of the United States.

Franchise Tax.

I will consider franchise tax first. It is claimed this is an *ad valorem* tax on property pure and simple and as it is not levied on property of other corporations and individuals it constitutes an unlawful discrimination in violation of both the Federal and State constitutions.

This franchise tax is one-tenth of one per cent of the *ad valorem* value assessed throughout the State upon the prop-

erty of the railroads used in their operations in the State as common carriers and payable directly at a fixed date to the State Treasurer.

It is true that if this court should hold that the *ad valorem* tax on property is excessive, discriminatory, or confiscatory and the assessments should have to be reduced, then of course the amount of the franchise tax would necessarily be decreased, but that would not totally destroy it. It is the principle upon which it is based upon which its validity depends.

If this franchise tax is in reality an *ad valorem* tax on property levied solely on railroads for support of State government, then it is a discrimination against the plaintiffs and is an infraction of the State Constitution as well as in conflict with the statute enacted at same session of Legislature which declares that no *ad valorem* tax shall be levied on property for the support of the State government and that the only *ad valorem* tax that may be levied on property shall be levied by the counties, cities, and other divisions of the State for their own support exclusively.

We most confidently contend that this franchise tax is not an *ad valorem* tax on property under the guise of a privilege or franchise tax, but is in fact and truth a franchise tax.

That the Legislature so understood and intended it to be is perfectly manifest. It has been levying franchise taxes of some kind or other for many years. It has levied no other franchise tax than this at its session of 1921. The Legislature expressly declared this to be a franchise tax to be devoted to the expenses of the State government and expressly declared that no *ad valorem* tax whatever should be levied on property for such State expenses.

This is about as plain a legislative declaration of the character of this tax denominating it a privilege tax and not an *ad valorem* tax on property as it was possible to make. If the intention of the Legislature is worth anything then it is beyond dispute what that intention was. I admit that the Legislature cannot levy what is manifestly an *ad valorem* tax on property and by calling it a franchise tax make it so. But this court will respect the manifest purpose of the Legislature and unless it is perfectly plain and clear that the tax in dispute is nothing else but an *ad valorem* tax levied on property for support of the State government, this court will respect the act of the Legislature and not declare it void.

We submit that this tax is not in any sense an *ad valorem* tax and possesses none of the usual attributes and ear-marks of that kind of tax.

This tax is not a lien upon property as an *ad valorem* tax on property is. It is not collected by the taxing officers of the State who collect the *ad valorem* taxes. It is paid directly to State Treasurer by the railroad company. That officer issues his receipt certifying its payment. It could not be collected by execution, as a tax list in North Carolina is in nature of an execution. In case of refusal to pay it would require legal proceedings in the courts to collect it.

There have been for many years franchise taxes, which are in the nature of a license to do business, exacted in all the States of the Union. There have been different methods of estimating what is a fair and proper license tax for exercising the corporation franchise.

The method adopted by our Legislature seems to me to be a most certain and accurate method. It charges the rail-

road company a sum of money for doing business within the State equal to one-tenth of one per cent of the assessed value of its property used in its operations within the State and reads as follows:

> "The basis upon which such calculation shall be made by State Tax Commission and the extent to which every such railroad company is exercising its franchise in this State shall be found to be the value of the property tangible and intangible, of each such railroad company in the State assessed for the year in which such report is made for *ad valorem* taxes. The franchise tax of each such railroad company for the privilege of exercising its franchise in this State shall be one-tenth of one per cent of the value so ascertained by the State Tax Commission and such tax shall be due and payable on or before October fifteenth, each year."

This is plainly not an *ad valorem* tax on property in any reasonable and fair construction. It is simply the measurement of the value of the franchise, the privilege to do business within the State, to exercise its franchise within the State and is based upon the assessed value of the property used in the State in the exercise and enjoyment of that franchise.

It appears to me that this method of finding out what the privilege of doing business within the State is worth, is much fairer, more stable, certain, and accurate than to measure it by the capital stock, gross receipts apportioned to the State or any other method I have read of.

It is well settled by the decisions of this court cited in defendant's brief that a State may exact of a non-resident railroad or other public service corporation, a tax for the

privilege of doing business within the State. The State has no right to require of an interstate railroad company the payment of this tax in advance as a prerequisite to entering or doing business within the State. That would be an obstruction to interstate commerce. This court will bear in mind carefully that there is no such condition whatever contained in our statutes.

The tax is not required to be paid as a prerequisite. It can only be collected by ordinary legal process by the State Treasurer.

There are different methods of measuring the value of the privilege of doing business within the State upon part of foreign corporations.

It seems to be well settled that this is a matter within the sound discretion of the Legislature, within some limitations. The tax must not be in its nature obstructive of or a hindrance to interstate commerce.

It must be reasonable and not confiscatory and must be imposed upon all corporations of a like character and business.

The granting of this privilege is a matter entirely within the power of the State, whether the corporation be of domestic or foreign origin.

It may therefore be conferred upon such terms as the State may seem conducive to its own interest or privilege. It may require the annual payment into its treasury of a specific sum of money. It may gauge the amount exacted for the license by the value of the business permitted to be done within its borders as disclosed by its gains or receipts of the present or past years.

Referring to this subject, Mr. Justice Field said, in Grand Trunk Railroad case, 142 U. S., 228:

> "The character of the tax, or its validity is not determined by the mode adopted in fixing its amount for any specific period or the times of its payment. The whole field of inquiry into the extent of revenue from sources at the command of the corporation is open to the consideration of the State in determining what may be justly exacted for the privilege."

The same subject is discussed and same conclusions announced by Justice Strong in the Gross Receipts Tax cases, 82 U. S., 293.

Text writers, as well as many decided cases, hold that a privilege tax is not a property tax. Whether the tax is laid upon property as a direct tax upon property or imposed upon a corporation for the privilege of conducting business in the State is to be determined from the operation and practical effect of the State statute and not from its form.

This is the view of Mr. Elliott and many other authorities cited in his work on railroads, section 761.

In Telegraph Company *vs.* Adams, 155 U. S., 696, it is clearly held that a tax may be imposed on a foreign corporation by a State on its property within the State and may take the form and character of a tax for the privilege of exercising its franchise within the State provided the payment of the tax be not made a condition precedent to the right to carry on the business but its enforcement left to ordinary means for collection of taxes.

In Mining Company *vs.* New York, 143 U. S., 305, the right to tax a foreign corporation for exercising its franchise and to measure the value of that privilege in any reasonable manner is recognized as settled.

In Society for Savings *vs.* Coite, 75 U. S., it was held:

"A statute of a State requiring savings societies, authorized to receive deposits but without authority to issue bills, and having no capital stock, to pay annually into the State Treasury a sum equal to three-fourths of one per cent on the total amount of their deposits on a given day, imposes a franchise tax, not a tax on property," and as such is valid.

At page 608, the court says:

> "Different modes of taxation are adopted in different States, and even in the same States at different periods of their history. Fixed sums are in some instances required to be annually paid into the treasury of the State, and in others a prescribed percentage is levied on the stock, assets, *or property owned or held by the corporation,* while in others the sum required to be paid is left indefinite, to be ascertained in some mode by the amount of business which the corporation shall transact within a defined period."

The most recent case is Railway *vs.* Arkansas, 235 U. S., p. 350, where it is held that

> "Property in a State belonging to a corporation, whether foreign or domestic, engaged in foreign or interstate commerce, may be taxed, and may take the form of a tax for privilege of exercising its franchise within the State, if measured on value of property wholly within the State, and provided payment of the tax be not made a condition precedent to carrying on business including interstate business, but the enforcement of the tax left to ordinary means for collection of taxes. Citing Postal Tel. Co. *vs.* Adams, 155 U. S., 688."

I think this case is conclusive that whatever this tax in dispute may be called and on whatever it may be levied it is

exacted as a compensation to the State for the privilege of doing business within its boundaries and is not an *ad valorem* tax upon property to support the State government. It is, pure and simple, a privilege tax for doing business within the State and may be levied in any way the State thinks best provided it does not interfere with interstate commerce. It is not claimed that it is spoliative or confiscatory and its reasonableness is a matter for the State.

Ohio Tax cases, 232 U. S., 577.

Failure to Tax Stocks in North Carolina Corporations.

It is contended by Norfolk & Southern Railroad in its brief, that the Legislature has refused to allow an *ad valorem* tax to be levied on stocks in North Carolina corporations as required by the State Constitution and that the State has permitted counties, cities and towns to levy an *ad valorem* tax on property of the railroads and that this constitutes an illegal discrimination.

The Constitution reads as follows, article 5, section 3:

> "Laws shall be passed, taxing by a uniform rule, all moneys, credits, investments in bonds, stocks, joint stock companies, or otherwise; and also all real and personal property according to its true value in money * * * The General Assembly may also tax trades, professions, franchises and incomes."

The same contention might be made by every farmer or other taxpayer who owned a foot of land in the State.

The fact that some property has unlawfully escaped taxation is no reason that other property should escape taxation. Because my property may be wrongfully omitted from the

tax-lists is no reason why somebody else's property should be omittted. The remedy is to cause the property escaping taxation to be placed on tax lists and to accomplish this our State laws furnish ample remedy. But there is really no ground for this contention in fact.

An examination of our tax laws will disclose that "Investments in stocks, bonds and the like are taxed and fully taxed in accordance with the State Constitution."

Prior to 1887 domestic corporations in North Carolina were required to list their real and personal property and pay taxes thereon upon valuations fixed by local assessors at the situs of the corporation—that is, in the county where located. The corporation itself was not required to list its capital stock for taxation. The shareholder was required to list his shares of stock at the place of his residence and pay the taxes on it as there assessed.

Under this method it was found that all the stock owned by non-residents escaped taxation as well as a large part of that owned by residents of the State, while all that was listed for taxation was greatly undervalued, as its value was fixed by the owner.

In the year 1887 the law was changed and the present method of taxation of investments in stocks adopted, under which system no investment in stocks in North Carolina corporations do or can escape taxation. The same law substantially has been on statute books for a third of a century and has never been materially changed. It has been re-enacted by every legislature. It is set out in the Machinery Act of 1921. Section 42 refers to bank taxation and section 43 to taxation of all other domestic corporations. See acts of General Assembly 1921. The officers of these corporations are

required to file with State Tax Commission a report showing total capital stock, number of shares issued, par value of each share, dividends declared and highest prices of stock.

The tax officers thereupon fix the tax value of each share and the corporation is required to pay the tax assessed against this stock for the owner and may charge the tax so paid to his account if they see fit to do so.

I submit that this law meets the requirements of the Constitution and is a tax upon "investments in the stock of the corporation."

There is nothing in our Constitution requiring the Legislature to tax both the capital stock and the certificates of stock.

When the capital stock is taxed, then the "investment" in the corporate stock is taxed and it matters not whether that tax is paid by the corporation for the shareholder or by the shareholder individually. It is manifest that the State Constitution does not require the Legislature to pass laws taxing both the capital stock and also the shares into which it is divided. The result is the same whichever is taxed. Taxing the investment in the capital stock is the most efficient and productive method of collecting the tax.

Some courts draw a distinction between the capital stock and the shares into which it is divided. But that is immaterial for purposes of taxation where both are not required to be taxed. The Legislature is the sole and exclusive judge of what constitutes double taxation when it comes to declaring the tax policy of the State. Whether the Legislature can tax both is immaterial here. It has never done so, but has followed the example of all other States and has taxed the investment in the capital stock and made the corporation pay

it for the shareholder. The result is far more productive of revenue than the former method. In any view we fail to see that this presents any Federal question or anything this court can take hold of.

The Ad Valorem Tax on Property.

One other ground of complaint upon part of plaintiffs relates to the *ad valorem* tax assessed against their real and tangible property situated in the different cities, towns, counties and governmental subdivisions of the State.

They paid all taxes assessed against them in 1919 and 1920 and only the *ad valorem* property taxes for 1921 are involved in these suits in addition to franchise tax already discussed. As before stated, there is no *ad valorem* tax assessed against plaintiffs' property for State purposes.

All the facts are fully stated in defendant's brief and the subject fully discussed with full citation of authority and reference to our statutes and full explanation of our tax laws. I will confine what I have to say to one or two propositions which I think are completely decisive of these cases.

Under our laws all real and personal property of all description belonging to individuals and corporations, other than railroads, are valued by local assessors. This includes the property of railroads not used by them in their business as common carriers. The property of railroad corporations used by them in their business as common carriers is valued for taxation by a central State authority as a whole, and then the total assessment is allocated to the counties through which the road runs on a mileage basis. A similar allocation is made on a mileage basis to cities, towns, and any other taxing districts through which the roads run.

These allocated proportions of the total unit assessment are the basis for local property taxation.

In 1919 a revaluation of all property in the State was ordered, including railroad property. This revaluation was to be subject to the approval of the Legislature. This was ordered because it was a well-understood fact that all property, railroads and all corporate and individual property, had been for many years valued at much less than its true value in money.

This revaluation was had and was to be used as a basis for assessing *ad valorem* taxes thereafter.

The revaluation of plaintiffs' property was made by State Tax Commission and reported to the Legislature, which adopted, ratified, and approved such revaluations. These valuations thus became the valuation made by the Legislature itself. All real estate was increased in value an average of 300 per cent, personal property 194 per cent, railroad property used in business of common carriers 99 per cent. Thus it is seen that railroad property was increased in value very much less than any other property.

After this was all approved at special session of legislature in August, 1920, there was a very great and extraordinary slump in values of farm products and farm lands as well as in cities and towns. In consequence the Legislature in January, 1921, provided for a review of land values the valuation of which had been fixed for four years and provided that the local authorities might, subject to approval of the Central Tax Commission, reduce these valuations in their sound discretion. The boards in 67 counties reduced real property valuations various percentages and in 33 counties refused to make any reductions.

No reduction was authorized in the assessment of personal property, although it had been enormously increased, because that is reassessed every year instead of every four years. This legislation did not apply to railroads because they were valued by the State Tax Commission upon a unit basis and there was really no evidence that they had decreased in value. Nevertheless the State Tax Commission and its successor, the Commissioner of Revenue, were given power to review upon application the railroad valuations.

These several plaintiffs applied to the Commissioner for a reduction of their assessments. He considered each individual case on its merits and refused all except Norfolk and Southern Railroad and reduced that five million dollars. This Commissioner was a different individual from those composing the Tax Commission who made the original valuations.

All the facts and contentions respecting this part of the case are fully set out in our brief.

The argument that the Legislature in 1921 unlawfully discriminated against railroads when it authorized local authorities in each county to reduce in their discretion the valuations which had been fixed for four years in lands, to be approved by State Tax Commission, is easily answered.

The local authorities had nothing to do with valuing railroads. They were valued by the State Tax Commission and its successor, the Commissioner of Revenue. The railroads were given the right to apply, and all of them did apply, to the Commissioner and had a full rehearing. Upon the evidence offered he refused to reduce the valuations except Norfolk and Southern and did reduce its value five millions.

Thus it appears that the valuations now complained of were

fixed by the Tax Commission, then approved and adopted by the Legislature, and affirmed on a rehearing by the Revenue Commissioner, who had succeeded to the powers and duties of the Tax Commission. Three different authorities passed on the valuations and reached same conclusions, except as to Norfolk and Southern, the valuation of which was reduced by the Revenue Commissioner. This road paid taxes in 1920 without complaint on the reduced value, which is only four million in round numbers in excess of its own valuation upon which it paid tax pending this appeal. That is to say, it admits a valuation of 18 millions and is assessed at 22 millions in round numbers.

It is contended that the State Tax Commission failed to follow the State statute in the method adopted in fixing the value of these railroads. I don't think this point is a very serious one.

The statute is directory and directs the roads shall be valued as a unit. It presents certain methods of ascertaining their value. It is not exclusive or mandatory. It is merely directory except that it requires the roads be valued as a unit.

The State Constitution requires that all property, including railroads, shall be valued at its true value in money. That is the paramount law and the Tax Commissioners had the right not only to pursue the directions of the statute but to weigh and consider every reasonable element that would throw light upon the true value of the property. If your honors will read the affidavit of the Tax Commissioners in the record you will find a very clear and concise statement how they went about to assess the value of all this railroad property. They considered every element of value pointed out by the statute.

They called on the roads for their estimate of the actual cost of reproduction and estimated by their engineers, but could not get it. They considered the value placed on them by interstate commerce experts as a basis for fixing freight rates. They considered the stock and bond method—that is, they took the market value of their indebtedness and of the stocks of the roads as indicating the value the financial world placed on them. This of course changes constantly but it is some evidence. The Commission then capitalized the roads upon a 6 per cent basis. Upon that basis the roads are worth much more than their present assessed value. The Commission did not fix the value by any one of these methods but considered and weighed them all and reached their conclusions as follows:

Southern, former value.....	$46,869,942.00..	Present,	$96,605,694.00
Atlantic & Yadkin, part of Southern	1,975,806.00..	Present,	4,104,710.00
Seaboard R. R., former value	20,191,720.00..	Present,	34,768,440.00
Atlantic Coast Line, former value	34,645,345.00..	Present,	50,867,800.00
Norfolk & Southern, former value	Not given.....	Present,	22,023,462.00

According to this evidence, either the Southern or the Coast Line, measured by either method considered by the Commissioners, is worth very much more than the value placed on them, and those are the roads that first started this litigation and are kicking the strongest. But suppose, for argument's sake, the Commissioners did not follow the direction of the statute, they were required to report their findings tentatively to the Legislature. They did so, and after due consideration and debate those values were adopted, became the values fixed by the Legislature itself. That

body had the right itself to assess the value of railroads and all other property in the State and its finding and act are not reviewable by this or any court unless the values fixed are spoliative and confiscatory. In this record there is no such allegation in either bill and not a scintilla of proof.

My brethren for plaintiffs are presenting these cases to your honors as if you were tax assessors sitting to review State authorities in matters over which the States have exclusive control and are not reviewable unless they have placed their value so high that they are spoliative and confiscatory.

I know your honors are great judges, but I doubt if you would give equal satisfaction as tax assessors, although I must admit that this court has made some very sage remarks in regard to valuing railroads which were evidently regarded by our Commissioners.

In the Backus case, 154 U. S., 122, it is said:

> "The value of the roadway at any given time is not the original cost, nor *a fortiori,* its ultimate cost after years of expenditure in repairs and improvements. On the other hand, its value cannot be determined by ascertaining the market price of adjacent lands, and adding the value of the cross-ties, rails, and spikes. The value of land depends largely upon the use to which it can be put, and the character of the improvements upon it. The assessable value, for taxation, of a railroad track can only be determined by looking at the elements on which the financial condition of the company depends, its traffic, as evidenced by the rolling stock and gross earnings *in connection with the capital stock.*"

In that case, Mr. Justice Brewer also said:

> "The judgment of a State board empowered to fix valuation of railroads for taxation cannot be set aside by testimony of witnesses that the values were other than fixed by the board, where there is no evidence of *fraud* or *gross error* in the system on which the valuations were made."

Upon this right of a State to value property within its jurisdiction, Mr. Justice Holmes said in Coulter *vs.* Railroads, 196 U. S., 599, cited fully in our brief:

> "It is not beyond the power of a State, so far as the Federal Constitution is concerned, to tax the franchise of a corporation at a different rate from other tangible property in the State."

Much evidence was taken in these cases relating to sales of private landed property in the attempt to show discrimination in values as against the railroads. As to the worth of such evidence, Justice Holmes said in the same case:

> "It is obvious that the accidental sales of property in a given year may be a misleading guide to average values apart from the testimony that some, at least of the conveyances, do not report true prices, yet they furnish the chief weapon of attack."

In considering this case, I beg your honors to carefully bear in mind that these valuations have been considered, passed upon, and approved by three State authorities:

1. The Board of Tax Commissioners.

2. The Legislature itself.

3. And finally reviewed by the Commissioner of Revenue by legislative authority upon petitions to review.

The separate action of these three authorities, and especially of the Legislature, raises a powerful presumption of legality and impartiality and is amply sufficient to prevail over the allegations of the plaintiffs' bills and the unreliable and easily-acquired evidence they offer. In the language of Justice Clarke, formerly an honored member of this court, in the recent case of Duane & Jackson, cited in our brief:

> "The case presented is clearly not one of that extreme inequality in taxation of which the Federal courts should lay hold, but involves rather a question of State policy, of a character which the people have been satisfied to leave to the judgment, patriotism, and sense of justice of representatives in their State Legislature."

No allegations and no proof to justify this court in disturbing State valuations.

We confidently assert that there is no evidence of inequality or partiality in the valuation of railroads and other property in the State. After allowing for the reduction made in 66 counties in land values, yet landed property is valued over 200 per cent higher than it was before the revaluation in 1919, while the Southern Railway property is valued barely 99 per cent more and some of these railroads not that much.

There is attached to defendants' answers a table showing taxable values of real and personal property in every county in North Carolina in 1919, and at the present time after reduction in 66 counties in 1920. To illustrate: In Beau-

fort County, where I reside, the taxable value in 1919 was $10,597,149.00. Tax value after revaluation and after reduction, $37,669,805.00. Guilford County, $30,943,498.00. After revaluation, $116,052,573.00.

The table shows an enormous increase in the value of private property, other than railroad property, in every county in this State upon which values taxes are paid at this time without complaint.

It is only the railroads that cost the State many thousands of dollars during present year to protect their property, that are complaining.

Railroads differ so from other species of property that they cannot be measured by the same rules, but we confidently assert that there is no evidence of any inequality in this record. If there is any, it is in favor of the railroads. But suppose there is, then in the terse language of Justice Holmes in the Coulter case: "Inequality, we repeat, is nothing unless it was in pursuance of a scheme."

This brings me to the point I regard as conclusive that plaintiffs are not entitled to relief demanded.

The relation of the Federal Government to the taxing systems of the States of the Union has been the subject of much discussion by the judges of this court, but there seems to be one clear and unqualified principle set forth in all the opinions which has never been overrated or qualified.

To warrant the Federal courts to interfere in State taxation and to set aside as discriminatory assessments for taxes, it must appear that the discrimination in favor of one class of property or other classes, as against others, was intentional and systematic. Greene *vs.* Louisville & I. R. R., 244 U. S., 499, 517; 37 Sup. Ct., 61 L. Ed., 1280; Ann. Cas. 1917E,

88; Sunday Lake Iron Co. *vs.* Township of Wakefield, 247 U. S., 350, 353; 38 Sup. Ct., 495; 62 L. Ed., 1154; Taylor *vs.* Louisville & Nashville R. R., 88 Fed., 350, 364, 365; 31 C. C. A., 537. In the Lake Iron Co. case it was said:

> "It is also clear that mere errors of judgment by officials will not support a claim of discrimination. There must be something more—something which in effect amounts to an intentional violation of the essential principle of practical uniformity. The good faith of such officers and the validity of their actions are presumed; when assailed, the burden of proof is upon the complaining party."

This subject is very fully discussed and all the Federal authorities cited in Union Pacific R. R. *vs.* Christiansen, Federal Reporter of November 10, 1921.

The latest utterance of this court on this subject is Duane *vs.* Jackson, cited in our brief, where it is very forcibly said:

> "While the nature of the subject does not permit of much finality of general statement, it may plainly be derived from the cases cited that since the system of taxation has not yet been devised which will return precisely the same measure of benefit to each taxpayer or class of taxpayers, in proportion to payment made, as will be returned to every other individual or class paying a given tax, it is not within either the disposition or power of this court to revise the necessarily complicated taxing systems of the States for the purpose of attempting to produce what might be thought to be a more just distribution of the burdens of taxation than that arrived at by the State Legislature (4 Pet., 517; 7 L. Ed., 939; 15 Wall., 319; 21 L. Ed., 179; 109 U. S., 400; 3 Sup. Ct., 205; 27 L. Ed., 976; 185 U. S., 371; 22 Sup. Ct., 673; 46 L. Ed., 949, *supra*),"

and that where, as here, conflict with Federal power is not involved, a State tax law will be held to conflict with the Fourteenth Amendment only where it proposes, or clearly results in, such flagrant and palpable inequality between the burden imposed and the benefit received, as to amount to the arbitrary taking of property without compensation—"to spoliation under the guise of exerting the power of taxing." 134 U. S., 237; 10 Sup. Ct., 533; 33 L. Ed., 892; 173 U. S., 615; 19 Sup. Ct., 553; 43 L. Ed., 823; 239 U. S., 220, 36 Sup. Ct., 66; 60 L. Ed., 230, *supra*. For other inequalities of burden or other abuses of the State power of taxation, the only security of the citizen must be found in the structure of our Government itself. So early as 4 Pet., 563; 7 L. Ed., 939, *supra*, it was said by Chief Justice Marshall:

> "This vital power (of taxation) may be abused, but the Constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the State governments. The interest, wisdom, and justice of the representative body, and its relations with its Constitution, furnish the only security, where there is no express contract, against unjust and excessive taxation; as well as against unwise legislation generally."

The Federal courts are not a harbor of refuge for ill-advised and unequal legislation.

This is said by Justice Field in Mobile *vs.* Kimball, 102 U. S., 691, and reiterated by Justice McKenna in Magoun *vs.* Trust Company, 170 U. S., 293.

There are no allegations in these bills of a fraudulent purpose, or a combination or scheme of any kind to overvalue railroad property or to discriminate between that and other

property. Your honors will search in vain for a scintilla of evidence to support such charges. Proof without allegation is as ineffective as allegation without proof and in these records there will be found neither. Under the system of valuing property in North Carolina it is almost impossible that there should be any kind of scheme to overvalue railroad property and to undervalue lands.

Landed property is valued by three assessors in each township of the one hundred counties in our State. These assessors have no connection with the Central Tax Commission, and doubtless never see them.

This Central Tax Commission valued railroad property and their valuations are approved and adopted by the Legislature composed of 170 members. This valuation, by authority of the Legislature, was again reviewed upon plaintiff's petition by the Commissioner of Revenue.

It is thus perfectly manifest there could not be any scheme, mutual purpose or common design or desire to do any injustice to these plaintiffs. There is no real evidence that any mistake of jurisdiction has been made.

If the evidence proves anything it is that prior to the revaluation in 1919 railroad property and all other property had been valued much less than its real value and that this error has been corrected.

Respectfully submitted,

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Of Counsel for Defendants.